Pleas for Religious Liberty and the Rights of Conscience.

ARGUMENTS

DELIVERED IN THE

SUPREME COURT OF THE UNITED STATES

April 28, 1886, in three cases of

LORENZO SNOW, PLAINTIFF IN ERROR,

v.

THE UNITED STATES,

On Writs of Error to the Supreme Court of Utah Territory.

BY GEORGE TICKNOR CURTIS
AND
FRANKLIN S. RICHARDS.

When we compare the strange respect of mankind for liberty with their strange want of respect for it, we might imagine that a man had an indispensable right to do harm to others, and no right at all to please himself without giving pain to any one.

JOHN STUART MILL.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
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[Lorenzo Snow, commonly called "Apostle Snow," a rank in the hierarchy of the Mormon Church, was convicted and sentenced on three indictments in the District Court of Utah Territory, for violating the 3d section of the act of Congress passed March 22, 1882, known as the "Edmunds act." The judgments were affirmed by the Supreme Court of Utah, and the cases afterwards brought to the Supreme Court of the United States, by writs of error, and there argued together. The law under which Mr. Snow was indicted prohibits cohabitation "with more than one woman." The evidence in the case showed that he lived exclusively with one of his wives, and had no association with either of the others which would have been in any degree improper in any other gentlemen, but he had acknowledged them all to be his wives. The facts in evidence, and the questions arising on the bills of exceptions, so far as they were discussed by Mr. Curtis, sufficiently appear from the following stenographic report of his argument.]

ARGUMENT.

Once, may it please your Honors, and once only, in the course of my professional career, I have been counsel in a case in which the life of a human being was at stake. This was in the days of my youth—46 years ago—when the energies were full, when ambition was high, when applause was sweet, and the desire for success was keen. And now, when I have passed my three score and ten, have arrived at an age when we look backward and not forward, when fame no longer allures and little is left but duty to be discharged because it is duty, I find myself here engaged in a cause which is directly to affect the peace, the welfare, the safety, the religious constitutional rights of thousands of my fellow creatures, and may possibly draw into its consequences the lives of some of them. Bear with me this great responsibility, at least so far as to understand and appreciate the grounds of my apprehension. Bear with me while I separate those considerations and elements which are fit to be entertained by this Court, from those which belong exclusively to the statesman and the legislator. No one can be more sensible than I am, that when a statute is to be construed by a court,

it is the meaning and intent of the lawgivers that is to be ascertained. I do not need to be told that it is your province not to make laws, but to interpret and apply them. Nevertheless, it does happen under our system of government, that even when there is nothing to be determined but the construction of a law, constitutional provisions must be taken into consideration; and when that is not the case, it also happens that the time of the enactment of the law, the circumstances which led to it, the public facts and public equities which surround it, each and all are of fit and proper consideration in determining the meaning and application of the language of the legislature to successive cases as they arise.

I am firmly convinced, after a very thorough study of these cases, that both of these inquiries arise on these records. I am to submit to you a constitutional question which involves the religious liberties of these people called Mormons; and it arises in this way: This man was convicted three several times on evidence which was precisely this and no more, that on a certain day he casually introduced an acquaintance of his to two women, who were present in the marshal's office when he was under arrest, as his "wives," and that is all there is of his language which is in evidence in these cases. The whole of his other conduct, if you grasp all its incidents in one bundle, resulted from moral and religious duties, as he estimated and believed his religious duties to be, and this I shall demonstrate to you, I think, is the precise question here. Without a doubt, it presents a constitutional question, and a very grave one.

The first proposition to which I have to ask your attention is stated on the 22d page of my brief.

THE CONSTRUCTION GIVEN BY THE COURT BELOW TO THE 3D SECTION OF THE ACT OF MARCH 22, 1882, AND ON WHICH THE PLAINTIFF IN ERROR WAS THRICE CONVICTED, MAKES IT VIOLATE THE FIRST AMENDMENT OF THE CONSTITUTION, BECAUSE IT MAKES

THE STATUTE PUNISH THE PROFESSION OF A RELIGIOUS BELIEF, WHEN, UNDER THAT CONSTRUCTION, IT IS APPLIED TO THE EVIDENCE IN THE THREE CASES NOW BEFORE THE COURT.

In approaching the subject of religious liberty, there is of course a great deal of antecedent history to be taken into account. I do not propose to go over the whole of it, because most of us here are legal and historical scholars. You, Mr. Chief-Justice, in a recent case, Reynolds *v.* United States, (98 U. S.,) had occasion to develop the subject somewhat. It is necessary for me, on this occasion, to supplement what you then said by a little further development of the subject; and, moreover, it is necessary for me to show what was the religious persecution on which history had set the seal of its condemnation before our Constitution was made. In all the modern ages of the world in which religious persecution has been carried on by governments, or in the name of public authority, the whole essence of the atrocious wrong has been this—power has said to the weak: "Renounce your religious opinions, recant your religious beliefs, or die, or go to prison." This was what was said by Phillip II and the Inquisition to the whole anti-Catholic party in his dominions. This was what was said by Bloody Mary, of England, when she burnt her Protestant subjects at the stake. This was what was said in the persecution in Northern Italy in the seventeenth century, to the subjects of the Duke of Savoy, when the great Protector of the Commonwealth of England signified that if that persecution did not cease the English guns should be heard in the Vatican. This, too, was what was said (with inexpressible grief and shame I advert to it) by my Puritan ancestors of Massachusetts when they hanged Quakers. This is what I am to show will be said by this Edmunds act to the Mormons of Utah, if it is to be construed and applied here as it was construed and applied by the territorial judges. If I fail in showing this, I shall fail in this branch of my argument. If I succeed in showing it, these judgments will be reversed.

I pass to the more immediate threshold of the constitutional question. But before I cross it I must advert again to the two religious persecutions which stand nearest in time to the establishment of our Constitution. I have alluded to the persecution in northern Italy which Cromwell checked. It was while that persecution was going on that Milton penned that grand sonnet which rang like a trumpet through Christendom :

> Avenge, oh, Lord ! thy slaughtered saints, whose bones
> Lie scattered on the Alpine mountains cold.

It was Milton, too, who, as Latin Secretary to the Protector's government, wrote the despatches which threw the shield of England over nearly all the Protestants of the Continent ; a protection which they did not lose until Charles II basely sold himself to the French king for gold. That protection was not again afforded to them until William of Orange lifted the crown of England out of the degradation into which it had fallen when it was worn by his uncles.

What the poet said about the poor peasants of the Alps is what some future Milton may have to say if we do not find some better way out of this sad problem in Utah than any that we have yet tried. For, if the barriers of the Constitution are to be disregarded, we may soon hear that the blood of these people is demanded. We may take warning from the spirit of violence that prevails everywhere. Everywhere those who are disliked for any cause are made the victims of popular rage. At this moment a bill is passing through Congress to indemnify certain Chinese for outrages committed upon them by mobs. The Mormons will suffer anything rather than have their religious convictions forced out of them by persecution ; and this is what is now tried by the machinery of the criminal law *as it is administered in that Territory.* They will obey the law when they can learn what it requires of them ; and whatever is done to them, they will not be driven into rebellion, much as some

of their enemies might like to have them, for they hold the doctrine of non-resistance by physical force as a part of their religious creed. They will use no violence, but they may be made the victims of violence.

The persecution which Milton denounced, and which Cromwell stayed, occurred just three years before the persecution of the Quakers in Massachusetts. The most accurate account of the Quaker persecution is to be found in Palfrey's History of New England. It transpired one hundred and twenty-seven years before the Constitution of the United States was adopted.*

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*The persecution of the Quakers in Massachusetts occurred in 1658–59. The following account of the executions is to be found in Palfrey's History of New England, vol. ii, pp. 11–14 :

"For a little time there seemed reason to hope that the law would do its office without harm to any one. The first six Quakers who were banished after its enactment went away and returned no more. But William Robinson heard of it in Rhode Island, and Marmaduke Stevenson in Barbadoes: and they judged themselves to be commissioned to put it to the proof. They came to Boston, and were joined there by Mary Dyer, from Newport, and Nicholas Davis, from Barnstable. The four were arraigned and received sentence of banishment, with the addition that they would suffer death if they came back.

"Nicholas Davis and Mary Dyer found freedom to depart: * * * but the other two were constrained in the love and power of the Lord not to depart, but to stay in the jurisdiction, and to try the bloody law with death.' After four or five weeks they returned to Boston, and were again joined there by Dyer, who had again reconsidered her duty. Brought to trial under the recent statute, they were all three sentenced to be hanged on the eighth day following. Precautions were taken against a popular outbreak, for there was a general disgust at what was going on. A hundred pikemen and musketeers were detailed to guard the convicts to execution. A strong night watch was set, and sentries were posted in and around the town.

"At this point, without doubt, if not before, the government should have paused and retraced its steps. It would have had to acknowledge itself beaten; but this it could afford to do, and this it was obliged to do at last. Perhaps each party had continued to hope that the other would relent when the terrible gallows should be reared. But so it was not to be. The contest of will was to last longer. Whatever the rulers of Massachusetts in those days promised or threatened, that it was their practice to do. On the other hand, if they presumed that their antagonists were susceptible of fear, the supposition was a mistake. On the appointed day, the prisoners, sur-

The distinction between the case of Cannon *v.* The United States (116 U. S., 55) and the three cases of Snow *v.* The United States is broad and clear.

Treating the three present cases as one, for the purposes of the argument, because, with reference to the constitutional question, all the evidence that needs to be considered was the same in all of them, I shall contend that the evidence on which Snow was convicted under an erroneous construction of the statute makes the conviction and sentence violate the free exercise of religion guaranteed by the 1st amendment of the Constitution.

In Cannon's case unlawful cohabitation was held to consist in a man's living in the same house with two women, eat-

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rounded by the guard, went from the gaol in Queen (Court) Street to Boston Common, hand in hand, Mary Dyer walking between the other two. The men were hanged, and their bodies were buried beneath the gallows. Dyer, who had stood during the execution with a halter about her neck, was now told that she was dismissed to the care of her son, who had come from Rhode Island to intercede for her. Her courage had not yet reached the height to which it aspired. She accepted the deliverance, and was led out of the jurisdiction.

"The undaunted deportment of the sufferers increased the wildspread resentment against the law which had condemned them; and the Court found it necessary to justify itself in two other 'declarations,' sent abroad, the one in print, the other in a circular-letter, from the secretary to the towns. Dyer was not satisfied with herself, and in the following spring, after some aimless wanderings, she again came to Boston, and was again brought to trial, and doomed to die. At the gallows once more the offer was renewed to her of release if she would promise thenceforward to keep out of Massachusetts. But she rejected it, and met her fate with brave determination. 'In obedience to the will of the Lord I came,' she said, 'and in His will I abide faithful to the death.'

"With an inconsistency which shows the repugnance felt by the magistrate to execute the hard law, it was left inoperative in some cases of manifest violation. But it had one more victim. William Leddra returned from banishment, and was apprehended and brought to trial. An offer of liberation was made to him if he would engage to go to England. But he rejected it, saying that he had no business there. He was condemned and executed. 'All that will be Christ's disciples,' he said at the foot of the ladder, 'must take up the Cross.' The last words he was heard to utter were those of the martyr Stephen, 'Lord Jesus. receive my spirit.'"

ing at their respective tables one-third of the time or thereabouts, and holding them out to the world, by his language or conduct, or both, as his wives, without occupying the same bed with either of them, or sleeping in the same room, or having sexual intercourse with either of them. No constitutional question arose in that case because there was no language proved to have been used by Cannon, in speaking of either of the two women as his wife, which required to be put to the jury to find whether he used the term "wife" as indicating a spiritual and religious relation, or used it to signify a claim of right to continue a carnal relation with both of them notwithstanding the prohibition of the statute. But, in Snow's case, the only evidence of his language consisted in proof that he spoke of two women as his "wives," under circumstances which called for a distinct instruction to the jury to find in what sense and with what intent he used that language. If he spoke of the women as his "wives," meaning that by the religious law of his church he was bound to them in a spiritual and religious tie that did not necessarily signify the enjoyment of a carnal relation, but was a mere expression of his religious belief, he could not be convicted of unlawful cohabitation by his *language*, or by the use of his language as part of the evidence of guilt, without violating his rights of conscience. On the other hand, if he spoke of the women as his "wives," in a sense of a claim of right to maintain a carnal relation with them, or to dwell with both of them, notwithstanding the prohibition of the statute, the evidence of his language might go to the jury, along with the other facts proved, without violating his religious freedom; and if the whole evidence, taken together, had a reasonable tendency to show unlawful cohabitation, under a proper definition of that offence, he could have been convicted without a violation of his religious freedom. The imperative necessity, therefore, for a careful instruction to the jury to find in what sense and with what intent he used the word "wife," or "wives," which

instruction was not given, and was refused, is perfectly apparent.

The CHIEF-JUSTICE: Was there a request of that kind?

Mr. CURTIS: I am going to show presently what the request was, and I say that it covers the whole ground.

The sole proof of Mr. Snow's language consists in the fact that when under arrest, and in the marshal's office, he introduced *Harriet* and *Sarah* as his "wives" to Mr. Peery, an acquaintance of his and a brother Mormon, just previous to the examination before the U. S. commissioner. His words were: "Mr. Peery, or Brother Peery, this is my wife Harriet; Mr. Peery, or Brother Peery, this is my wife Sarah." (Testimony of Franklin N. Snow, record in case No. 1278, p. 16.)

The extreme importance of having it ascertained by the jury in what sense, and with what intent, he spoke of these two women as his "wives" is apparent from the testimony of the women who were made compulsory witnesses for the prosecution.

Thus, Mary Snow, speaking of Mr. Snow's occasional visits to her, said, in answer to a question put by the prosecution: "In these visits, and in all our intercourse, we recognized each other as husband and wife just as much to-day as ever." What did *she* mean? She was married in 1857. In a previous part of her evidence she testified that "there is a great deal of difference between our relations the past year and eleven years ago." Yet she considers herself as his wife to-day just as much as ever, although she lives entirely by herself, in her own house, and he has merely called on her as a friend. She *could* have meant only that spiritual and religious tie which, according to her and his belief, is created by one of their marriages according to the law of their church, and may be wholly distinct from any carnal relation or any cohabitation, although they hold that it sanctifies the carnal relation.

Eleanor Snow. Married 35 years ago in Nauvoo; resides

in her own house; lived in company with Harriet and Sarah. Mr. Snow lives across the block, and has lived there about four years; in 1885 Mr. Snow called on her for a few minutes two or three times; she says "I guess I recognized him as my husband and he me as a wife during 1885." She could not have meant a recognition of any other than the spiritual and religious tie.

Sarah Snow. Married nearly forty years; has lived for nearly thirty years at the old homestead on Main street; from the time she was married until about ten years ago she lived with him, but has since had a place by herself; "he has not introduced me as his wife for the last ten years, as I can remember, but there has been no less the relation of husband and wife;" she must have meant the spiritual and religious relation.

Minnie Snow. She is the wife with whom he has lived exclusively for four years in the full sense of cohabitation. She says: "I know all the other ladies who have testified, they are his wives;" she, too, could only have meant "wives" according to their religious belief. She testifies, again, "he has not, to my knowledge, publicly claimed these other women as his wives; he has never spoken to me of them as his wives, to my knowledge; certainly they *are* his wives, and it was so understood in the family during the past year."

This testimony is in the record of case 1278. In the case No. 1279, the following is found on page 14:

Eleanor Snow. "*According to my religion* I was a married woman in 1884, and my husband was Lorenzo Snow, and I never was divorced from him. * * * *According to my religion* I recognized Mr. Snow as my husband in 1884." By no possibility could she have meant anything but the relation of husband and wife according to their religion. (See also the question put to her by the court and her answer, page 15.)

Mary Snow. "*According to my religious belief* I am married, and was married to defendant in 1857, and have had no

divorce," *i.e.*, no divorce according to the law and custom of their church.

It is of the utmost importance, therefore, for this Court to know what the religious belief of these people is, and what authorizes the Court to use the ordinary means of judicial knowledge.

The 7th section of the act of March 22, 1882, speaks of bigamous or polygamous marriages known as Mormon marriages, in cases in which such marriages have been solemnized according to the ceremonies of the Mormon sect.

This opens all the ordinary sources of judicial knowledge respecting the marriages of the sect referred to, and allows me to read from the book that is accepted by them as the authorized statement of the law of their church.

Moreover, there is testimony in one of these records which distinctly explains what a Mormon marriage is. It is the testimony of Harriet Snow, who was married to the defendant forty years ago, and it is to be found in the Record in case No. 1279, pp. 12, 13, which was the second case tried.

And here I will say that for simple pathos, for dignity, for clearness of ideas and of expression, I have never seen any piece of human testimony that is to be compared with the evidence of this Mormon matron, put on the witness-stand by a public prosecutor to convict her husband of a crime. She has been examined by the District Attorney, and is now under cross-examination for the defence. I will read :

"I was married to Lorenzo Snow in Nauvoo in 1846, and have never been divorced. He was not my husband in 1884, according to the general term of husband. He did not live with me as a wife. He had arranged for my support, and I drew it as common. In 1884 I looked upon him as my companion, the husband of my youth. In 1884 the marriage relation did not continue, as it was in my young days. I was an old lady in 1884."

Now she is apparently addressing herself to the judge and jury, because the counsel for the defence was of her own faith :

"I call myself a married lady. I was sealed to the defendant for time and eternity. When a lady gets so that she cannot bear children, then she is re-

leased from some of her duties as a wife. I mean that he is my companion, but not husband. In 1884 I lived in my own house."

She puts into eleven words the whole of their doctrine on the subject of the marriage relation.

"I was sealed to the defendant for time and for eternity." There is the whole doctrine. "When a lady gets so that she cannot bear children, then she is released from some of her duties as a wife. I mean that he is my companion but not husband."

The Mormon faith on the subject of plural marriage is to be found in the Book of Doctrine and Covenants, a copy of which I have caused to be placed in the Congressional Library, and that copy is precisely like the one I hold in my hand. The subject is found at section 132, clauses 1 to 7, 48, 61 to 63. I will read the title page—"The Doctrine and Covenants of the Church of Jesus Christ of Latter-Day Saints, containing the Revelations given to Joseph Smith, Jr., the Prophet, for the Building up of the Kingdom of God in the Last Days. Second Electrotype edition, published at Liverpool, in 1882."

The whole Christian world scorns the idea of a subsequent and supplemental revelation. But the question is not what we believe. It is not what we can receive. It is what these people believe, have believed, and hold with perfect tenacity and sincerity of conviction, and have lived by and died by. The doctrine, the philosophy, and the right of religious liberty in this country, are imbedded in our fundamental law, and we have not yet reached a state of things in which an expression of belief, or any conduct which is not in and of itself injurious to society, or so declared by the legislative authority; we have not yet reached a condition of things in which belief, when so held, and so professed, and carried out in innocent conduct, is to be touched by the hand of criminal law. And here, may it please your honors, I beg to be explicitly and carefully understood. I have asked for this variation in the order of addressing the Court, not only in

order that your honors may know exactly what I do not and what I do contend for, but in order that the counsel for the Government may have no reason for misapprehending me. Of course I do not stand here to contend that a man's religious belief operates to prevent the legislative power from prohibiting conduct which that power deems injurious to the welfare of society. The Mormons once made that contention, at least up to a certain point; but I am not asked to make that contention now, and I could not make it if I were. Beyond a doubt the legislative power, where it has a full legislative authority over any community, may punish overt acts, may define such and such conduct to be *malum prohibitum*, and the man who continues that conduct must be punished if he is convicted; but with all that, and notwithstanding all that, when there is clear evidence before this Court that the statute has been so construed and so applied to a state of facts, by an inferior court, that conviction and punishment have been reached, and could only be reached, by trenching on the rights of conscience, then the person cannot be touched.

The section to which I refer in this book, is entitled, "Revelation on the Eternity of the Marriage Covenant, including Plurality of Wives. Given through Joseph Smith, in Nauvoo, Hancock County, Illinois, July 12th, 1843."

1. Verily, thus saith the Lord unto you, my servant Joseph, that inasmuch as you have inquired of my hand, to know and understand wherein I, the Lord, justified my servants Abraham, Isaac, and Jacob; as also Moses, David, and Solomon, my servants, as touching the principle and doctrine of their having many wives and concubines:

2. Behold! and lo, I am the Lord thy God, and will answer thee as touching this matter:

3. Therefore, prepare thy heart to receive and obey the instructions which I am about to give unto you; for all those who have this law revealed unto them must obey the same.

4. For behold! I reveal unto you a new and an everlasting covenant; and if ye abide not that covenant, then are ye damned, for no one can reject this covenant and be permitted to enter into my glory;

5. For all who will have a blessing at my hands, shall abide the law which was appointed for that blessing and the conditions thereof, as were instituted from before the foundation of the world:

It must be explained here that there is in the hierarchy of this sect, a number of different orders of priesthood. In one sense, every man is a priest, and the law as it is laid down is this :

61. And again, as pertaining to the law of the Priesthood : If any man espouse a virgin, and desire to espouse another, and the first give her consent ; and if he espouse the second, and they are virgins, and have vowed to no other man, then is he justified ; he cannot commit adultery, for they are given unto him ; for he cannot commit adultery with that that belongeth unto him and to no one else ;

62. And if he have ten virgins given unto him by this law, he cannot commit adultery, for they belong to him, and they are given unto him, therefore is he justified.

63. But if one or either of the ten virgins, after she is espoused, shall be with another man ; she has committed adultery, and shall be destroyed ; for they are given unto him to multiply and replenish the earth, according to my commandment, and to fulfil the promise which was given by my Father before the foundation of the world ; and for their exaltation in the eternal world, that they may bear the souls of men ; for herein is the work of my Father continued, that he may be glorified.

Mr. Justice Field : Is that the book known as the Mormon Bible ?

Mr. Curtis : No, it is not.

Mr. Richards : What we call the Book of Mormon is sometimes called the Mormon Bible.

Mr. Curtis : This book which I have in my hand is the recognized embodiment of the law of their church.

Justice Field : Does that contain what is supposed to have been found on steel plates ?

Mr. Richards : No, your Honor, but the Book of Mormon does.

Chief-Justice : This is a supposed subsequent revelation, is it not ?

Mr. Richards : This book contains the revelations received by Joseph Smith. The Book of Mormon was translated by him from the plates referred to, which were gold, and is a history of the ancient inhabitants of this continent.

Mr. Curtis : Here we are with all our civilization around us, and all our sentiments and feelings on the subject of the

marriage relation, almost incapacitated from understanding how there can be purity, womanly virtue, dignity of life, refinement and cultivation, domestic harmony, among educated people, maintaining this relation, in which several women stand as the wives of one husband. But whether we have to act upon this subject as legislators, or as judges, or as philanthropists, or as patriots, or as citizens, we can do no good, we can accomplish nothing but pain and misery for others, and mortification and baffled hopes and disappointed efforts for ourselves, unless we can rise to that condition of mind which enables us to stand in the inner circle of their feelings and convictions, and so far to treat them as our equals—equals before the law, equals before the God who made us all. Without doing so, we can never expect the Mormon women to meet us half way, or to meet us at all.

There is a gross error that is standing in the way of all efforts of the Christian world, by whomsoever attempted, to reach this, which is accounted so great an evil. We cannot, unless we meet the Mormon women of Utah half way, and recognize who and what they are, we cannot accomplish anything useful. It is unphilosophical, it is absurd, it is dangerous to deal with the subject in any other way. The idea of treating these women, many of them women of New England birth, people, at least, of intelligence, educated in the public and private schools of our older States, as if they were a set of degraded beings, wearing a yoke under which they bend, and from which it is our duty to emancipate them by any and every means—including strained constructions of the criminal law—if we do not lay aside this idea we can never do anything successfully with this terrible problem.

The whole evidence, taken together, consisted of the word "wives," as used by Mr. Snow, and the proof of his visits to the houses inhabited by some of them, besides Minnie, with whom he dwelt exclusively in a house which she and her children alone inhabited.

In the case first tried, (Record 1278,) the conviction rested on this evidence, as applied to the case of *Sarah*, who was held by the appellate court to be the *lawful* wife. Cohabitation with *her* was held by the Chief-Justice of the court below, in his opinion, to be established by a presumption of *matrimonial* cohabitation, and by *inferences* from the facts. As cohabitation in every sense with *Minnie* was admitted by the defendant, the general verdict of "guilty as charged in the indictment" fixes the unlawful cohabitation in this case as cohabitation with *Sarah* and *Minnie*. In this all the judges below concurred.

This covered the period from January 1, 1885, to December 1, 1885—eleven months. There was evidence in this very case which should have admonished the trial judge of the nature of the relation of husband and wife claimed by these persons.

I have referred in the brief, but will not now read it, to the evidence of four witnesses, which is very important if your honors will please to look at it. It is the evidence of Harriet, Mary, Eleanor, and Sarah, in Record 1278, pp. 8, 10, 11, and 12.

All this evidence gave to the trial judge the most pointed notice that here he was dealing with the term "wife" or "wives," in a sense that might, when spoken by Mr. Snow, comprehend nothing but a religious doctrine and a religious belief.

It was his plain duty, *sua sponte*, to put it to the jury to find *in what sense* Mr. Snow introduced Mr. Peery to Harriet and Sarah as his "wives."

He was asked to charge so that the jury would not be misled.

The 5th prayer is the one I now present to your honors' attention; and in it, I say, is included a request, a necessary request, an indispensable part of the charge, without which justice could not be done.

Fifth Request. "Having more than one wife and claim-

ing and introducing more than one woman as wives do not constitute the offence charged. You must find, to justify a conviction, that he has lived with more than one within the time stated in the indictment."

Instead of giving this instruction, he throws into the scale the term "wife," used by Mr. Snow, along with the other evidence about visiting, &c., and tells the jury that from all this farrago they may infer unlawful cohabitation with two or more women!

The next case tried was that in Record 1279, the indictment covering the whole of the year 1884.

Here the conviction rested on cohabitation with *Adeline* and *Minnie*.

Here *Adeline* is taken as the *lawful* wife, and Minnie as the *unlawful* wife, in 1884, whereas *Sarah* was held to have been the lawful wife in the first trial, which related to eleven months of 1885.

I will now briefly apply the constitutional principles, for which I contend, to the facts of Mr. Snow's conduct.

I surrender to the just judgment of this Court all that part of his conduct which may by any fair interpretation of the statute be considered as cohabitation with *Sarah* and Minnie, or with *Adeline* and Minnie.

But there is another aspect of his conduct. Standing here, as I do, on his absolute constitutional right to the free exercise of his religion, I ask you to see that his conduct consists of—

1. A *declaration*, in which he used the word "wife," in speaking of *Harriet* and *Sarah*. He could have meant nothing but the spiritual and religious relation.

2. Association and acts of a kind that could *not have been dictated* by anything but a religious obligation and duty.

These acts were every one innocent and meritorious.

They were not done in the assertion of any right of cohabitation.

He had a perfect right to do them.

They have not the smallest tendency to *prove cohabitation.*

There was no cohabitation with either Sarah or Adeline.

It is only by strained, distorted, and artificial constructions of this word "cohabitation," that these acts can be reached and condemned.

What were they?

Visiting at rare intervals.

Supporting.

Driving out in a carriage with one or more of them.

Attention to a sick child.

A festivity on his birthday in the place of their public worship.

Now look at his religious belief—*his* and *theirs.*

The *relationship* evinced by his conduct is purely and exclusively moral and religious.

What "flaunting in the face of the world of the ostentation and opportunities of a bigamous household" is there here?

What did your honors mean by that language?

Does it apply to these acts?

What is a bigamous household?

Do you mean that there is a household where the parties do not live in the same house?

Do you mean that there is a household when they live one, five, ten miles apart?

Remember, I pray you, that here, in one case, Sarah lives in one house and Minnie in another. That in another case Adeline lives in one house and Minnie in another; and the proof is incontrovertible that he never was seen in company with Adeline anywhere during the time covered by the indictment, and that he dwelt exclusively with Minnie.

He had duties to discharge toward these women.

These duties are natural; they spring from the law of nature.

They are of moral obligation.

They are of perpetual obligation.

They are of sacred obligation.

They are duties, which, when we consider how and when they were assumed, and how they have become woven into the texture of his life, it would be barbaric to punish.

The law says what? That he shall not "cohabit" with more than one of them.

Is that word to receive an interpretation that will require him to renounce *every duty*, to dishonor the dead, and agonize the living, and bring shame upon himself?

Is it to receive an interpretation without any reference to the obligations or restraints resting on the sovereignty which enacted the law?

Is it to be made to mean a constructive dwelling together, when there has been nothing but the discharge of duties of the highest obligation?

This constructive cohabitation makes this single word the most elastic that was ever put into a statute.

There is nothing that it will not reach. Let me enumerate.

1. Cohabitation with sexual intercourse. That is of course within the statute.

2. Cohabitation by dwelling under the same roof, without sexual intercourse. That was Cannon's case. Now we come to the dividing line.

3. Cohabitation by dwelling under different roofs, but occasionally seeing each other, and without sexual intercourse.

4. Cohabitation by dwelling in different towns, but writing to each other, sending supplies, delicacies, medicines, &c., in case of sickness.

5. Cohabitation by living in different countries, but corresponding, and speaking of each other as husband and wife.

6. Cohabitation by acts of kindness and attention during a series of years, although not dwelling together; and then when the death-bed scene comes, and the husband stands there for a last farewell, and when all is over for this life, he follows her remains to the grave, and writes on the gravestone, *Harriet, wife* of Lorenzo Snow—that, too, is unlawful "cohabitation!"

Have we enacted a law so barbarous as this, in the vain hope that we can stamp out of the human heart a religious belief in a relation that subsists in it when oceans roll between the parties, and when one has crossed the gulf that separates time from eternity? No, we have not! Such constructions are impossible.

The trial judge had before him the very impressive testimony of Mrs. Harriet Snow, which I have quoted, showing the religious doctrine of their church on the subject of plural marriage, bringing clearly and sharply to his attention that in their belief there is a spiritual relation, for time and eternity, between a husband and his wife or wives, yet he says not one word to the jury about this doctrine, but he tells them to take Mr. Snow's *language*, of which there was no evidence whatever concerning *Adeline*, and, coupling it with his continuing to support her, to convict him of unlawful cohabitation with two women, one of whom is *Adeline*, in whose company he was never seen during the time charged, and the other of whom was *Minnie*, with whom he habitually dwelt.

Now I must ask your honor's attention to the language of Judge Boreman, on page 25. This is what that judge says on the subject of polygamy in a written judicial opinion:

"In the case under consideration we find a state of affairs which, by the facts developed in this class of cases, is coming to be well known to have a common existence in this Territory. The wife of a man's youth, and all the other women with whom he has lived as husband more or less of the time, and who have reared children to him, are, as they grow old, pushed off to lead a more lonely life, and the principal attention of the man is given to the youngest and most favored of his women. It is the natural result of a system founded on sensualism, and is the same here as in every other country where polygamy or any other system exists to shield the lust of men."

Oh, rare judicial consistency! These unfortunate Mormons are first charged with neglecting their elder wives, and pushing them off to lead lonely lives, and then such kindness and attention and care for the elder ones as they do show is used to convict them of unlawful cohabitation, by the aid of a legal presumption that they cohabit with the

older ones, notwithstanding they have pushed them off! Can judicial folly go farther than this?

I observe that the learned counsel who represents the Government on this occasion has echoed in his brief a considerable part of this cruel insult to the prisoner who was before the court. In order to inflict that insult, Judge Boreman misread and misrepresented history; for what he states as the same result of the system of polygamy in every other country is not true. If any man has lived within the last two hundred years who understood India and all the East better than Edmund Burke, his name has not become known to the world. In his speech before the House of Lords on the impeachment of Warren Hastings, and in his speech in the House of Commons on Mr. Fox's East India Bill, he shows with distinctness the provision that is always made for the great polygamous families.*

Now what was true, and always has been true, of the greater harems of the East, is true of the lesser households, and has been true in all ages. A modern Turk, of whatever condition of life, who has more than one wife, would no more think of treating his eldest wife, or his elder wives, as this territorial judge imputes to all men in all countries where polygamy prevails, than he would think of killing his grandmother. "Where polygamy or any other system exists to shield the lust of men." It is because this is the public cry, because this is the imputation—that this system exists to shield the lust of men—that we postpone, we put aside, we forego all efforts to understand it, and to see whether it is or is not something else.

Justice MILLER: If I do not interrupt this portion of your argument, I would like you to explain this spiritual aspect. You have referred several times to the spiritual aspect of this Mormon marriage, these plural marriages as distinguished from the ordinary relations of husband and wife, and

* Works of Edmund Burke, vol. viii, p. 273; iii, p. 476. London edition of 1852.

you have read from that book to show that there was something of a different relation.

Mr. CURTIS: In their belief.

Justice MILLER: Well, in their belief. Now, the extract which you read from that book, as I caught the idea, was to the effect that the purpose of these plural marriages was to multiply children and to increase the race. Is that different from any other marriage?

Mr. CURTIS. I am coming to that presently.

Justice MILLER: As that is the foundation for your saying that there is a distinction, at least in their belief, and that their belief is something that has not anything to do with this carnal result of an ordinary marriage, I would like to know what it is.

Mr. CURTIS: Perhaps, sir, I cannot answer in your way, but I certainly see my own way about it clear enough. What are we to do with the great positive fact that polygamy existed in the Semitic race from the origin of that race? It was sanctioned by God Almighty, was regulated by the law of Moses, was practised by all the patriarchs; and what are we to do with the negative fact that our Saviour never prohibited it? Are we to conclude that it is a fit condition for modern society? No. Are we to conclude that it is a state of things that governments may not prohibit? Certainly not. What then is the conclusion? There must be some conclusion to be derived from it. The conclusion is plainly and indubitably this: that from the first origin of the human race, the marriage relation, the marriage condition, has comprehended a carnal relation, a sexual union, which exists for us as it does for all the other animals, in order that there may be a continuation of species; but beyond and behind all that is the central Hebrew idea of marriage, that it is a religious relation, a spiritual relation, whether it be monogamous or polygamous—that it is a relation between soul and soul. Now, what have these Mormons done on that subject? They have added to the central idea of the Hebrews

this further idea—they carry their idea forward into eternity, and they believe it, and certainly we have no right to question the sincerity whatever we may think of the religion as an imposture—they carry the relation into the endless futurity, and they say that it exists forever, whether it is a relation between one and one, or one and two, or one and three.

They accept the doctrine of the resurrection as it was given by St. Paul with such vivid prophecy of what is to happen at the last day, when this corruptible shall put on incorruption and this mortal shall put on immortality, and we shall be changed. "There is a natural body," said the great Apostle, "and there is a spiritual body"—masterly exposition—in which are united, in one brief sentence, truths of philosophy and reason, with information communicated by the Holy Spirit. There it stands in the Epistle to the Corinthians, and there it will stand forever. There it stands, too, in the belief of these Mormons; fixed and immutable in their faith as it is in the faith of all mankind who accept the revelations of the New Testament. The Mormon founder and prophet may have been an impostor—aye, a conscious impostor, if we choose so to call him. But on the doctrine of the resurrection and the kindred doctrine of the atonement, he is one with the whole Christian Church throughout the world. Let us see things as they are, and give them their due significance.

Another part of their doctrine is this: that among those whose circumstances admit of it, whose means and opportunities allow of it, and consent is given by all the parties, because the relation cannot be entered into otherwise—he who presents in the other world the greatest number of beings brought into existence here will receive a higher consideration there. But then here comes a difference in their views. There is a portion of them—and oh! if the people of the United States would only see it, here is the issue out of this terrible business—there are Mormons, hundreds and thousands, in that territory, who hold the religion in all its integrity, and in all its

length and breadth just as all the others do, but who have only one wife. What is the difference between them? Why it is simply a difference of interpretation of their religious law. One portion of them accept polygamy as mandatory; the other portion accept it as permissive; and if the government and people of the United States would only see what is their duty, this is the avenue, and the issue out of this whole difficult problem, as time shall go on, and as the providence of God shall bless our efforts. But of one thing there is a fixed moral certainty. The monogamous wives will suffer any extremity before they will be driven from the side of their polygamous sisters.

I now come, if your honors please, to the language of this Court in the case of Cannon. In the second case tried, Judge Powers, in his charge to the jury, garbled a sentence from the opinion of this Court in the Cannon case, and did not point out to the jury the difference between the facts of that case and the facts of the case he was then trying, and the jury must have been misled. The language of this Court in Cannon's case in reference to the statute was this:

"It seeks not only to punish bigamy and polygamy when direct proof of the existence of those relations can be made, but to prevent a man from flaunting in the face of the world the ostentation and opportunities of a bigamous household, with all the outward appearances of the same relation which existed before the act was passed, and without reference to what may occur in the privacy of those relations."

By a household I should understand persons dwelling in one house, or if dwelling in more than one that the head of the house should be going back and forth, and living alternately with one and alternately with the other wife.

The opinion of this Court was delivered December 14, 1885. It did not reach Utah until just before the 2d of these cases was tried. On the trial of the 1st case, Judge Powers was guided by his own unassisted wisdom and his zeal to procure a conviction. On the trial of the 2d and the 3d cases he had the opinion of this Court in Cannon's case before him in its full text.

It must have been manifest to him that the sentence which he quoted was an illustration only of the facts of the case that were covered by the opinion; that it could have no application to a case which this Court could not have foreseen.

If we analyze the language of this Court, we find that it speaks of—

1. A *bigamous household.*

2. The ostentation and opportunities of a bigamous household.

3. The flaunting in the face of the world that ostentation and those opportunities.

4. A continuance of *the same relations* which existed before the act was passed.

5. The non-inquiry into the privacy of those relations.

Taking all these ideas together, just as they were expressed, it was apparent that they applied only to the case of a man who dwelt under the same roof with two women, ate habitually at the separate table of each about one-third of the time, and had no other home or dwelling-place. This state of things constituted the ostentation and opportunities of a bigamous household, and the flaunting of them in the face of the world. These were *the relations* which were continued after the passage of the act, as they existed before its passage.

Moreover, in Cannon's case, there was no *language* that had been used by him in reference to the two women as his "wives;" nothing but his *conduct* was in evidence; and it was that conduct alone by which he held them out to the world as his "wives." No element, therefore, of the *religious sense* in which these people regard each other as husband and wife or wives, and are accustomed so to speak of each other, appeared of record in Cannon's case. This Judge Powers must have known if he read the opinion of this Court.

He read to the jury the sentence above quoted; made

them believe that it applied to Mr. Snow's case; never told them to inquire in what sense he spoke of *Harriet* and *Sarah* as his wives; left them to apply the language of this Court to his relations with *Adeline*, and, admonishing them sharply of the obligations of their oath as jurors to take the law from the court, he procured a conviction.

(See that portion of his charge which is on the top of page 22 of Record, No. 1279.)

I must now, as rapidly as I can, call your attention to the references which show historically the intent and meaning of the first amendment of the Constitution, which forbids Congress from making any law "prohibiting the free exercise of religion."

When the Constitution was before the States for adoption, while none of them made its amendment a condition precedent to their ratification of the instrument, six of them positively insisted on having various amendments made in the mode provided for, and three of them gave great emphasis to their demand for an amendment on the subject of religion. These were New Hampshire, Virginia, and North Carolina.

New Hampshire couched her demand in these words:

"The Congress shall make no laws touching religion, or to infringe the rights of conscience."

Virginia and North Carolina used a greater amplitude of expression. Both of them said:

"That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conscience, not by force and violence: and therefore all men have an equal, natural, and inalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established in preference to others." (Journals of the old Congress, vol. iv: Appendix, pages 52, 58–59.)

In this comprehensive summary of the whole doctrine, philosophy, and right of religious liberty we may trace unmistakably the hand of Jefferson, seconded by the hand of Madison. We know what Jefferson did for the establish-

ment of religious liberty in Virginia by the bill which he drew and promoted until it became a law. Speaking of this bill in his autobiography he says he "meant to comprehend within the mantle of its protection the Jew and the Gentile, the Christian and the Mohammedan, the Hindoo and Infidel of every description."

Madison and Patrick Henry, by their course in the Virginia assembly, when they were framing their bill of rights in 1776, left no doubt possible concerning the broad scope of religious freedom. When the subject of amendments of the Constitution of the United States came before the House of Representatives of the First Congress, Mr. Madison took the lead in formulating and carrying them through. What occurred on the subject of religion is to be found in the Annals of Congress.

1st Congress, 1789, pages 699, 757–759.*

So that there is no difficulty whatever in understanding the constitutional meaning of "the free exercise of religion."

It does not comprehend solely modes of public worship or external acts. It comprehends also the holding of religious beliefs and their avowal, whatever they may be, and the only possible limitation upon religious belief is that it shall not be pleaded in excuse for *conduct* which the legislative power sees fit to prohibit because it is injurious to the welfare of society.

If, therefore, the Edmunds act is to be so construed, and so administered and applied as to make it encroach in the smallest degree upon the right to hold and the right to avow a religious belief, it is so far inoperative and void.

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* There is one most felicitous and accurate phrase used in that debate by Mr. Daniel Carroll, of Maryland, which should be especially noted:

"As the rights of conscience are, in their nature, of peculiar delicacy, *and will little bear the gentlest touch of governmental hand;* and as many sects have concurred in the opinion that they are not well secured under the present constitution, he was much in favor of adopting the [proposed] words." (Annals of Congress, vol. i, 1789, p. 757.)

We cannot legislate against an idea. We cannot legislate against a thought or an expression of it. We cannot force any belief out of the human soul.

If the expression of a religious belief connects itself with conduct, with external acts, we *must* discriminate between that conduct and those acts which are plainly dictated by the belief, and are not *per se* injurious to the public welfare, and those which *are* so injurious, or are declared to be so, although dictated by a sincere religious belief.

For example, in the cases now before the Court, it is proved in evidence that there is a certain religious belief on the subject of marriage which makes it to those who hold the belief a religious and spiritual relation for this world and the next. That relation continues to subsist for them, although they never see each other, and although no cohabitation of any kind is possible. We may legislate to break up the carnal relation and to prevent continued cohabitation of a certain kind if it can be judicially defined. But all the while, and when the carnal relation and the cohabitation are broken up, or are voluntarily discontinued, there remains in the soul the religious and spiritual tie which we cannot reach and must not touch in punishing the conduct. Again, if the conduct of the parties towards each other continues to be that, and that only, which the religious belief dictates as a duty—which the common sentiments of humanity dictate—as visits of sympathy, contributing to support, providing the means of subsistence for women and children, in sickness or in health, in sorrow or in joy, acts which are not *per se* injurious to the public good, we cannot define them as unlawful cohabitation without violating the rights of conscience. By so doing we punish acts dictated by a religious belief in a religious and moral duty, the discharge of which is in itself perfectly innocent and harms no one. On the other hand, if the conduct is such that when put to a jury under proper instructions, it warrants the conclusion that the parties were living in defiance of the law under a pretext of religious and moral

duty, and that is of itself the kind of conduct which the law, rationally interpreted, meant to denounce, it may be punished.

There can be no pretence that this has been Mr. Snow's conduct in 1883, or in 1884, or in 1885.

I have now to ask your honors' indulgence to permit me to read something I have set down in writing in regard to the Mormon religion, because I meant to weigh every word that I say here on that part of the subject. This Mormon religion is the most remarkable phenomenon of its kind that has occurred for centuries. It is founded on an alleged new revelation. That is neither here nor there. It is believed by hundreds of thousands of people all over Christendom, and whether we call it an imposture or call it what we will, there is the fact that it is extensively believed.

This religion has been made the foundation of a very remarkable society. Like other religions, good and bad, it has its martyrs. Its prophet and founder was for his teaching put to death by a mob. Joseph Smith was murdered in jail, June 27, 1844, by an armed mob, disguised as negroes, and no one of his assassins was ever brought to justice. Several of his adherents lost their lives by lawless popular violence. The whole body of them were expelled from the country where they first gathered; where they built the city of Nauvoo, around which they made the region blossom like the rose. They were driven into a foreign country; that country became the property of the United States. They grew and increased, their religion all the while maintaining its hold upon them, and exercising a great power over their lives. They made a community more orderly, more moral, more thriving, than any equal number of people anywhere. The blots and scars and sores and scabs that are on our civilization in all our great cities and larger towns are not on theirs. In exclusively Mormon towns, there are no drinking shops, no gambling houses, no houses of prostitution, and none of that immorality which so shocks us in all our great centres of popu-

ulation. There is no profanity ; nowhere is Sunday more religiously observed—not even in Presbyterian Scotland or rigid Connecticut. Ninety per cent. of them own their houses and lands. Their farms average less than twenty acres each. This is a state of things unparalleled in any other part of the world.

Their religion, as I said before, is one that exercises great power over their lives. They accept all the cardinal doctrines of christianity, and both the greater sacraments. That feature of their religion which sanctions polygamy is what makes them obnoxious, and it is the grand provocative of the antipathy that breaks through the ordinary restraints of religious tolerance.

The popular mode in which they are attacked is by representing the women as slaves to the lust of men. This is the universal cry, and it is false. The relation of plural wives to one husband is just as voluntary on the part of the Mormon women, who are alleged to be the sufferers by it, as is the case with any other form of the marriage relation. This affords an explanation of the fact that there can be, as there are, purity, innocence, and womanly virtues among these women. If we seek a further explanation, it is to be found in the fact that the common ideas and customs of the world teach women to regard marriage as the one thing needful, and this explains why many women should prefer being one of several wives to not being a wife at all. But we must add to this the religious belief which they have embraced, and must have embraced before they can enter into the relation, because no Mormon priest or official of any kind anywhere ever has performed or can perform a marriage ceremony for any one who does not accept the belief, nor can a marriage be solemnized unless the first wife, if it is the marriage of a second, gives her consent. In this very case of Snow it is in evidence that he was married to two women on the same day, a thing that could not happen without a mutual consent ; and it is a well known fact, as occurring frequently within

the past forty years in that Territory, that women ask their husbands to marry one of their friends. Now you have the whole explanation of what it is so difficult to understand. That difficulty of understanding it, and the added unwillingness to understand it, or to reflect upon it with any kind of fairness, affords to their persecutors the opportunities and stimulus for breaking over all the bounds of religious toleration, for invoking and using the machinery of criminal law and pushing it up to and beyond the barriers which have been erected for the security of the rights of conscience.

It is the function of this high tribunal, raised above all prejudice, free from all passion, to discriminate between those outward acts which the law may punish because they are injurious to society, and that conduct which is in itself innocent, is dictated by a sense of religious duty, is harmless and praiseworthy, and therefore incapable of being made criminal, because it is under the shield of the Constitution. There is no difficulty in making this discrimination. Every day we analyze here the processes of the human mind. Every day we determine here the difference between one thing, the product of one man's ingenuity, and another thing made by another man ; and in that severe analysis we lay bare the anatomy of the human intellect. Are we so dull that we cannot discriminate between that conduct which the law may prohibit and that which it may not, when the religious constitutional rights of our fellow citizens are involved ?

Now, to bring this down to the technical shape of this record, which is what your honors must regard. On page 22 of Case No. 1278, your honors will find the fifth prayer for instruction. Having more than one wife, it says, and claiming and introducing more than one woman as wife, does not constitute the offence charged. You must find to justify a conviction that he has lived with more than one within the time stated in the indictment. Here is the whole defect of the entire evidence plainly pointed out. Can any lawyer deny that this was a necessary instruction ?

1. Having more than one wife.
2. Introducing more than one woman as a wife.

These facts do not constitute the offence charged. To justify a conviction, the jury must find that he *cohabited* with more than one.

Will any lawyer tell me that that was not a necessary instruction in this case, and that it was not a gross error to have refused it? It was refused, and no equivalent instruction was given.

And here I pass away from the Constitution. I leave it with reluctance, for I never know where my footsteps will stray when I undertake to explore the field of recent legislation, without the guide of the fundamental law. But before I leave that gracious presence, which is to me second only to that which looks down on us from the heavens, I think I hear her say to this statute, with all the majesty of her supreme authority: "Take then thy bond, take thou thy pound of flesh; take thy cohabitation; but in the taking and in the proof of it, if thou encroach by the estimation of a hair on the religious liberty of my subjects, thou diest!"

The second proposition, upon which I have to argue, is stated on the 35th page of the brief. I will read:

THE TERMS "COHABIT WITH MORE THAN ONE WOMAN," IN THE 3D SECTION OF THE ACT, ASIDE FROM ANY CONSTITUTIONAL OR OTHER OBJECTION TO THE EVIDENCE GIVEN BY THE PROSECUTION ON THESE TRIALS, DO NOT APPLY TO THE STATE OF FACTS PROVED IN EITHER OF THEM, THERE BEING NO EVIDENCE OF COHABITATION WITH ANY OF THE WOMEN, EXCEPTING MINNIE, DURING THE PERIODS COVERED BY THE RESPECTIVE INDICTMENTS.

1. Cohabitation of a man with a woman, in a penal statute, I should have said meant dwelling together in a sexual relation. But we have passed beyond that, and it has been held by this Court that it means something else. What it ought to be held to mean, in its application to these Mormons, depends upon a great deal of antecedent public history. A

penal statute, breaking in suddenly upon domestic relations that have existed for a long period of time, cannot be construed without some reference to what has gone before. The elements that have a legitimate bearing upon its construction are these :

First. The time of the passage of the law.

Second. The antecedent public history of the sect called Mormons, of their settlement in Utah, and the organization of the Territory.

Third. The public equities growing out of public facts.

Fourth. The numbers and situation of the persons to be affected by the construction given to the law.

Of all these things, excepting perhaps the *fourth*, the Court can judicially take notice ; and if I mention a few facts which I cannot prove from public sources I presume the Court will permit me to suggest them :

The law was enacted March 22, 1882. Polygamy had then existed in Utah, openly and to a large extent, for 35 years.

I must detain your honors for a few minutes upon the subject of the great exodus of the Mormons from Nauvoo, in 1846–7. It is a matter of public history. I want you to understand why I advert to it. It was a public act transpiring for a whole year in full view of the people of the United States. The polygamy that accompanied it all along was well known to the people and Government of the United States. It was the most remarkable expedition that has occurred, save in the difference of magnitude, since Moses led the Israelites out of Egypt. It began from a State of the Union. Two Senators of the United States, men very eminent in the public life of the country at that time, Col. Benton, of Missouri, and Mr. Douglas, of Illinois, intervened between the popular violence of the surrounding population and the government of Illinois, to negotiate protection for these people until they could depart, they agreeing on their part to go and seek a home out of the United States. They sold out their property at an enormous sacrifice, and

prepared for the great expedition. That expedition crossed the domain of the United States from the Mississippi to the Missouri, and there the head of the column wintered at Council Bluffs. While they were there during that winter, the Government of the United States made a requisition on Brigham Young, who was then the head of the Mormon church and the leader of these people, to form a Mormon battalion to go into the Mexican war. He responded and gave the flower of his young men, five hundred stalwart fellows. The United States Government sent military officers from this city to take the command, and the Mormon battalion went into the Mexican war and served until its close.

The expedition of which I have been speaking continued on in the spring of 1847 across the Rocky Mountains, and on the 24th of July, 1847, it halted at the Great Salt Lake in Mexican territory, and when all were gathered in, the settlers amounted to 20,000 souls, all holding one faith, and many of the older men having plural wives, which they carried along with them in the view of the whole country.* But they were not all gathered in until after the country became the property of the United States. Public opinion throughout the United States was at that time of one unanimous tenor. Their polygamy was well known. Every one said let them go. They are beyond the mountains, they are in a foreign land, let them have their religion and their polygamy, we are rid of them.

The press at that period was not what it is now. If it had been, this expedition would have been attended by a hundred reporters, and every incident of every day would have been described in newspapers, laid on the breakfast tables of the whole country, on the following morning. But the expedition

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* Mrs. Eliza R. Snow Smith, a sister of Mr. Snow, was the plural wife of Joseph Smith before the emigration from Nauvoo : she accompanied the expedition to the Mexican province and has ever since lived in Utah. She is about 80 years of age and, I am told, occupies a high intellectual and social position among the Mormons.

was not unnoticed by the press. By reference to the columns of the *National Intelligencer* and the *Union*, published here, you will find that this expedition was noticed from time to time. But this was not all. Not only was this emigration conducted in full view of the people and Government of the United States, but it was attended by a great exhibition of heroism, and of many of the most remarkable qualities of human character. These Mormons passed through tribes of Indians, who were at that very time fighting the troops of the United States. There were comparatively but few persons of foreign birth in the expedition. They were chiefly from New England, New York, Pennsylvania, and Ohio ; people educated in the public and private schools of those States, intelligent, many of them of the classes styled ladies and gentlemen. There was a good deal of the New England blood among them at that time. Among those who emigrated from Nauvoo was an educated Connecticut lady who bore my family name. She died on the way, and was buried in a grave, now unknown, in the deep black soil of the prairie. Although the Mormons passed through bands of Indians of the most hostile description, no scalp of a Mormon, man, woman, or child, was hung up in an Indian wigwam. No Mormon took the life of an Indian, or fired a gun except to bring down a buffalo, or some other game. They have always had more success, more Christian tact, in dealing with the Indians than any other white men on this continent of North America, excepting William Penn's Quakers. This is true of them now. All the great salient facts about this emigration were known to the people and Government of the United States through a whole year. It is of very little consequence to the purpose of my argument whether the law of Mexico, when they settled in Mexican territory, did or did not prohibit polygamy ; and it is also of no consequence, in my judgment, whether the treaty undertook to secure to them religious freedom after the country became the property of the United States, because when they passed under the Constitution of

the United States they received a guarantee of religious liberty that was far more effectual than any treaty could bestow.

Now allow me to follow down their history from 1848. The Territory was organized by act of Congress in 1850. Brigham Young was appointed governor of the Territory and so continued down to 1857. He was a man known by the whole country to be a polygamist. He died years afterward leaving seventeen wives and fifty or sixty children.

There was no interference and no legislation until 1862. The act then passed was believed by every Mormon in Utah to be unconstitutional. There were no prosecutions under it for a long time. At length, a test case was made, which reached this Court, and was decided at the October term 1878, and at some time in the winter of 1879.

The point decided was, as your honors well know, that their religion was no bar to the act of the sovereign power in declaring polygamist marriages to be bigamy. That was the point under consideration.

There the matter rested until the passage of the act of 1882. From the passage of the act of 1862 to 1882 is 20 years. From 1847 to 1862 is 15 years. From 1862 to 1879 (decision) is 17 years. From 1879 to 1882 is 3 years. From 1847 to 1882 is 35 years. Break up this whole period of 35 years as we may by any of these subdivisions, there is no one of the minor periods in which the people of the United States did not know that polygamy was extensively practised in that Territory, and was increasing. If it can be said that by the act of 1862 the Mormons had notice that the institution was to be broken up, what shall we say about the period of 15 years before '62, or about the 20 years that followed 1862 until 1882?

These considerations, of course, are no bar to legislation. But the legislative power was bound to regard them, and, in a court, these public equities must have some influence in the construction and application of the legislation to particular cases arising among so great a number of persons.

For example: When the act of 1882 went into operation there were about 2,000 heads of polygamous families in Utah, each one having an average of 3 wives. There were, therefore, about 6,000 women in polygamous relations. If we allow an average of 5 children to each wife, there were 15 children to each male parent, or an aggregate of 30,000 children in the Territory born of polygamous marriages. The whole population of the Territory was, in 1882, 150,000, about 120,000 being Mormons and the other 30,000 non-Mormons.

CHIEF-JUSTICE. Does the census of 1880 give the number of polygamous families?

Mr. CURTIS. No, sir; that is a calculation I have made from the most reliable data I could obtain. The census does not make any distinction in the population in that regard. In 1882 there were about 25,000 heads of Mormon families. If we deduct 2,000 heads of polygamous families, we have 23,000 heads of families who are not polygamists, but who hold the Mormon religious faith. I will now make the direct application of the public equities growing out of the facts antecedent to 1882 to the proper judicial construction and application of this law to the cases before the Court, Mr. Snow's case being, in all its important main features, the case of 2,000 other men in the Territory of Utah. I asked my young colleague and friend to have this diagram prepared in order to present clearly to the eye of the Court, according to the evidence, the situation of the premises. On a superficial view, it might seem that this was an establishment arranged to meet a certain state of things, or to meet a change in the law or a change in the condition of things in the Territory. (Referring to a diagram showing the location of the dwellings occupied by the several wives.)

The CHIEF-JUSTICE. Does the record show when these houses were erected?

Mr. CURTIS. It does; that house, called by these people the old homestead, with its separate divisions deeded to each of three women long before the Edmunds act, was built and

occupied by Mr. Snow thirty-five years ago. That house, within an enclosure and in a surrounding yard, in which Minnie dwells, was built more recently.

CHIEF-JUSTICE. That was not occupied until about the time the act of 1882 went into effect, was it?

Mr. CURTIS. The act found her living there. That is the evidence. Mr. Snow had been living there with her before the act of 1882. It is now over four years since he moved into that house.

The CHIEF-JUSTICE. These houses at the extreme right and left, how long have they been standing?

Mr. CURTIS. The evidence shows this is Mary's house (indicating on diagram.) This is the Tabernacle on the street, (indicating,) and that is the court-house (indicating.) This is the house of Adeline and Phœbe; so that the whole seven are accounted for and located.

The CHIEF-JUSTICE. Were those distinct houses erected before the law of 1882?

Mr. CURTIS. Oh yes, sir.

The CHIEF-JUSTICE. Does not that show that the practice of polygamy did not exclude such separate arrangements before any law against cohabitation was passed?

Mr. CURTIS. Of course it did not.

The CHIEF-JUSTICE. And your contention is against the idea that it is cohabitation, not that it is not polygamy.

Mr. CURTIS. You have got to do one of two things, and here is the choice. You have got to say cohabitation is a dwelling together, with or without sexual intercourse, either in one or two houses, under such circumstances as constitute a household, a "cohabiting" household; or else, on the other hand, you have got to say that while you find there is the relation of marriage which began forty years ago, or thirty-five years ago, or seventeen years ago, and which for certain purposes must continue, yet there need be no personal association whatever between the parties to constitute cohabitation. I submit that this cannot be and that the whole question is

as to the conduct and declarations of the parties and what that amounted to; and when it is said that the relationship must be broken up, you have got to define what relationship, and to say whether these men must turn their wives and children adrift upon the world.

Sarah Snow was married to the defendant in 1846, Harriet in 1846, Mary in 1857, Eleanor about 35 years ago, and Minnie in 1871.

Adeline, who was held in the second and third cases tried to have been the lawful wife, must have been married before any of the others named in the indictments. The date of Phœbe's marriage is not given, but in fact she was married about the same time as Mary.

So that of the whole seven, six—Adeline, Sarah, Harriet, Eleanor, Mary, and Phœbe—were married long before the act of 1862, and one—Minnie—eleven years before the act of 1882.

Now then let us pause for a moment. Will it be contended that a law that breaks in suddenly upon relations that were contracted in the full view of the people and Government of the United States without any interference, and punishes as "cohabitation" relations that have so long existed, is not to have its meaning interpreted by any reference to these facts?

For 15 years, from 1847 to 1862, six of these marriages had been subsisting—subsisting with *the full tolerance* of the people of the United States.

The seventh marriage took place in 1871, eleven years before the act that is to be construed.

During all this period this man has contracted duties towards these women which I need not explain again.

Now let us see. It is simply impossible for the Court, in the cases before it, with the persons who assumed these relations under such circumstances, not to give any consideration to the public equities. If I am asked what the bearing of these facts and public equities should be in a court, I answer

that they call for a construction of this one word, "cohabitation," that will confine its meaning and operation so as not to require these men to renounce every possible duty to these women and force them to turn them and their children adrift upon the world. It is impossible for this Court not to give any consideration to the public equities, in construing and applying this statute to the cases before it, of persons who assumed their relations to each other under at least a tacit permission of the people and Government of the United States.

While you leave it to the legislative power to enact anything to be a law that is within its constitutional authority, it is for you to determine the construction of whatever laws are made. You are the supreme, the undoubted, and indubitable fountain of justice, in the construction and application of laws.

Give these people then, I beseech you, as successive cases arise, a rule by which they can walk without being lost in the pitfalls of uncertainty and doubt. Tell them what you require of them, or rather what the law requires of them.

I do not ask you to go forward and give constructions and make provision for future cases. *I ask you to take this case*, and upon its plain facts to give a ruling and decision that will shut out these constructive "cohabitations."

These people are a loyal and a law-abiding people. They have a code of political ethics, accepted as part of their religious creed. I have studied it. There is no better code of political morals for the ground that it covers, ever formulated by a human pen, that has fallen under my observation, and I have been somewhat of a student in that kind of literature. If your honors care to read it, you will find it in their book of Doctrine and Covenants.

I here leave this case in your hands. But I cannot leave it without saying that the zealots who push the criminal law beyond the barriers of the Constitution are not the first, and perhaps they will not be the last, to seek to extend the kingdom

of Christ by persecution, and to propagate a religion of love by the gospel of hate.

Nor can I leave it without taking shame to myself that I have for so many years lived in ignorance of the condition of things in that devoted Territory. I have spent, on mere pecuniary interests, on lower politics, in the delight of letters and the pleasures of life, precious time that ought to have been given to the oppressed. If now my example, tardy as it is and feeble as it is, shall do something to arouse younger and more important men to a sense of their duty on this great problem, I shall have the consolation that I have done something to atone for my share in whatever blame rests upon this nation.

AN ARGUMENT

DELIVERED IN THE

Supreme Court of the United States,

April 28, 1886, in three cases of

LORENZO SNOW, PLAINTIFF IN ERROR,

v.

THE UNITED STATES,

On Writs of Error to the Supreme Court of Utah Territory.

BY

FRANKLIN S. RICHARDS.

ARGUMENT.

MAY IT PLEASE THE COURT:

In the discharge of a solemn duty, I stood in this august presence, at an early day of the present term, and asked for a construction of section three of the "Edmunds act." In the name of a whole people who were harassed by the most extraordinary and conflicting judicial interpretations made by the lower courts, I appealed to your honors for a removal of the doubts, and a dissipation of the mysteries, by which this strangely ambiguous statute had been enveloped. The decision of this Court in that cause, the Cannon case, was most conclusive, so far as the fate of that particular defendant was concerned, but it did not provide against future complications and oppressive constructions.

Once more I appear at this exalted forum upon a similar mission. I fear that I can add no new reasons, to those given on former occasions, why this supreme tribunal should grant to the devoted people of Utah a fixed definition of this incomprehensible law. I can only pray this Court, in its merciful justice, to remove the stumbling blocks, the snares and pitfalls, from the pathway of my people, and to shed light along the way which many must travel in order to conform their conduct to the requirements of this law. If your honors will do this—if you will but show what the law is, that it may be understood and obeyed—whatever may be the individual fate of Lorenzo Snow, the plaintiff in error, he will not feel that his jeopardy and privation have been in vain.

Mr. Snow, on separate trials, was convicted in the District Court of the First Judicial District of Utah Territory on three indictments for unlawful cohabitation; and the judgments, each for the highest punishment allowed by law, were affirmed by the Supreme Court of the Territory, and he is now imprisoned in execution of the same. The indictments are found under section 3 of chapter 47 of an act of Congress approved March 22d, 1882, which reads as follows:

SEC. 3. That if any male person in a Territory or other place over which the United States have exclusive jurisdiction hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court.

One indictment charged cohabitation with seven women as wives in 1883; another charged cohabitation with the same women in 1884, and the third charged cohabitation with the same women during the eleven first months of 1885. The trials occurred in the inverse order of the time covered by the indictments, commencing with the indictment for 1885; and the numbers in this Court do not correspond with the order of trial.

The questions in the first case tried involve the construction and effect of the section of the act of Congress above quoted and what constitutes an offence under it, also the evidence admissible to prove it, and the manner in which the questions involved were submitted to the jury. The questions arise out of objections to the sufficiency of the evidence under said statute, objections and exceptions to the admission and exclusion of evidence, and to instructions given to the jury and requests for instructions refused.

The other cases involve the same questions, arising in the same way, and each of them also involves two additional questions of general importance, to wit:

1st. Where the alleged cohabitation has been continuous and at the same place and with the same women, can the cohabitation be divided into separate offences marked only by an arbitrary division of the time?

This question arises on the ruling of the court sustaining a demurrer to pleas of the first conviction, and of the first and second convictions, in bar to indictments in the second and third cases respectively.

2d. Is the offence of unlawful cohabitation with more than one woman committed by a man's cohabiting with a woman not a lawful wife, and at the same time having a lawful wife

living with whom there is no cohabitation; and if there is a presumption of cohabitation with the lawful wife, is it indisputable and incapable of being rebutted?

This question arises on an instruction to the jury in the second and third cases, which I will read when I reach that point in my argument.

Our first assignment of error is: Insufficiency of the evidence to support the conviction.

The whole record shows an utter absence of evidence of cohabitation with any woman except the wife Minnie, and discloses the fact that the defendant lived exclusively with her and made his home at her house during the entire time charged in the indictment.

The marriages with the several wives had taken place at different periods, the first, Adeline's, occuring more than forty years ago, and the last, Minnie's, fifteen years ago. Each of the wives lived in her own home, conveyed to her by deed from the defendant, dated in 1874.

Adeline and Phœbe occupied one house, (which was conveyed to them in parts,) and had so lived for ten years. Their house was from a third of a mile to half a mile distant from that in which Mr. Snow lived with Minnie. Mary dwelt in a separate house and had so lived for ten years or more. Her house was about half a mile from Minnie's. Sarah, Harriet, Eleanor, and Minnie had resided in the adobe house called the "Old Homestead," each in her own part, and the defendant had also lived there until some time in 1881 or 1882, when he and Minnie moved into the brick house on the same block, where he lived exclusively until his indictment. Since Minnie's removal from the old homestead, Sarah, Harriet, and Eleanor, with their families have occupied it, each living in the part conveyed to her. The old homestead fronts east, on Main street, which runs north and south and is about twenty feet from the street. From the gate in front of the house a path leads northerly and westerly, passing partly around the east and north sides of

the house to the northwest corner of it; and continuing thence northerly, through a gate in the fence, between the old homestead premises and the brick house premises, owned and occupied by Minnie. The brick house is on an east and west street, fronts north, and is sixty to seventy yards from the old homestead, but on the same block.

Your honors can see from the diagram [indicating] where these parties lived, and I will now endeavor to tell you what the evidence discloses as to their manner of living.

There is no evidence that the defendant ever saw either Adeline or Phœbe during the time charged in the indictments. The evidence to show cohabitation with Sarah, Harriet, Mary, and Eleanor, or one of them, is in substance this:

He called on Mary and her family "as any other gentleman friend," four or five times during the eleven months of 1885, and remained from half a minute to half an hour. These calls were in the daytime, and he had not eaten or slept in the house nor been there at night. This leaves the occupants of the old homestead, Sarah, Harriet, and Eleanor.

He called two or three times on Sarah and her family, and remained half an hour—possibly an hour—during the day. Did not eat or sleep in the house, and was not there in the evening or at night. He was generally occupied during these calls in business conversation with Alviras, a son, who was assistant manager in the co-operative store of which the defendant was superintendent; but Mr. Snow also made inquiries about the welfare of the family.

He had called on Harriet and her family two or three times to inquire concerning the children and to learn of their well-being; and on business with Frank, a son, who was engaged in mercantile pursuits. He stayed a few minutes each time, and sat down from half a minute to perhaps half an hour.

He called on Eleanor and her family two or three times in 1885, remaining from ten to fifteen minutes each time, but did not eat or sleep there.

This is the whole evidence to show cohabitation in 1885, and there was less evidence of it in 1883 and 1884.

There was no room kept for him in any house except Minnie's. There he ate, slept, and stayed when at home. His mail and business papers came there; his personal clothing was kept and cared for there; and no indication existed of a home or habitation at any other place. Not only was it the fact that he lived exclusively at the brick house with Minnie, but it was also the understanding and repute in the neighborhood that he had so lived.

I confidently submit that such a state of facts cannot constitute a criminal cohabitation with more than one woman. There was in fact and in law no cohabitation with any woman but Minnie, and therefore the evidence is insufficient to sustain the conviction. I have, in discussing this point, dwelt more particularly upon the evidence in the case first tried, because it is the strongest of the three cases against the defendant.

Mr. Justice HARLAN. There is evidence that he claimed the women as his wives, is there not?

Mr. RICHARDS. Yes, sir; he admitted that they were his wives and that he had claimed them as such. I shall consider the effect of that admission in my next point, but, certainly, it alone could not constitute cohabitation.

Mr. Justice HARLAN. What do you say cohabitation consists of; what does cohabitation mean?

Mr. RICHARDS. I say precisely what your honors said in the Cannon case, that cohabitation means living together as husband and wife. And to violate this statute a man must so live with more than one woman.

As my illustrious colleague will have occasion to refer to the evidence, during his argument, I will pass on to the second assignment of error.

We contend that the court erred in admitting on the trial for cohabitation in 1885 evidence tending to show cohabitation with the same women in 1883 and 1884, and prior thereto,

when indictments for 1883 and 1884 were pending before the court.

The evidence so admitted extends through the entire case, and includes a comparison of the manner of living in the year 1885 with the manner of living prior thereto.

In objecting to the evidence the attention of the court was called to the indictments for 1883 and 1884, and the court held that it would take judicial notice of them and not require them to be offered in support of the objection.

The evidence was not only admitted, but the judge charged the jury as follows :

> If there is evidence that the defendant had married the women, had been living with them as his wives before the offence, it may be considered by the jury as adding weight to any circumstances proven, pointing to unlawful cohabitation during the time the offence is charged.

The statute, under which Mr. Snow was indicted, has been construed to mean a cohabitation with more than one woman as wives, or under the claim or color of a marriage relation. There were two things for the prosecutor to prove: The claim or color of a marriage relation, and the cohabitation—the latter being the body of the offence, the former only relating to the status of the person committing it. It is not disputed that, as to such status of the person, evidence would be proper covering any number of years, though separate indictments were pending, and that such evidence would violate no rule of law. The plaintiff in error, at the opening of the trial, admitted the status and the "holding out" of the women as wives in the broadest terms, as this quotation from the record shows :

> The defendant by his counsel admitted before the court and jury that he had been married to all the women named in the indictment, the last marriage being in 1871, and that he never was divorced from either; and ever since the respective marriages has claimed each of said women as his wife, but did not admit that he had cohabited with more than one of them during any part of the time charged in the indictment.

This reduced the issue to proof of the cohabitation during the time charged, and gave the prosecutor no excuse for offer-

ing evidence of prior cohabitation to show the status of the parties, or the "holding out" as wives.

The general rule that, to aid in convicting a person of one offence, the commission of another, though a like offence, cannot be shown to defendant's prejudice, is well settled. Mr. Bishop, in his work on Criminal Procedure, sections 1120 and 1123, says:

> On a trial for a particular crime, the State cannot aid the proofs against the defendant by showing him to have committed another crime. Not even on cross-examination can his case be prejudiced with the jury by testimony to any irrelevant guilt.

And this is the settled rule of law, as shown by the authorities cited in our brief.

The exceptions to the rule do not relate to the proof of the fact or act constituting the offence, but only to the questions of knowledge, purpose, malice, or intent, where such things characterize the act and are necessary to make it criminal or to enhance its criminality. The cases cited by opposing counsel go to this extent, but no further, and, in his argument on another branch of the case, he has conceded the very point for which we are here contending. After quoting liberally from the authorities, he says:

> From this practice it is clearly to be deduced that there might be any number of indictments against a party for either of the offences named, but that no one indictment could be supported by evidence which has been introduced under any of the others.

If counsel has stated the law correctly upon this point, and he certainly has, then it necessarily follows that there was error in admitting this evidence to prove the only fact in issue, and in giving instructions to the jury that they might consider it. The usual test as to whether one action or prosecution is a bar to another is whether the same evidence would prove or tend to prove each case. Here there were separate indictments for 1883 and 1884, for the same acts which were proved to procure a conviction for 1885.

Mr. Justice MILLER. Suppose there was but one indictment, that for 1885?

Mr. RICHARDS. Then I say the prosecution might have introduced evidence of what occurred in 1883 and 1884, because there was but one offence charged. But I most emphatically insist that a person cannot legally be convicted of three separate offences upon the same evidence introduced in three separate trials. Both law and justice forbid such a thing; and yet it was done in these cases. On the trial for 1885 the Court admitted evidence of what occurred in 1883 and 1884; on the trial for 1884 the evidence as to 1883 and 1884 was used the second time to procure a conviction; and on the trial for 1883 the same evidence as to what occurred in that year was used the third time.

Mr. Justice FIELD. It may be that the same testimony covers the three years.

Mr. RICHARDS. It is utterly incomprehensible to me, under the authorities, as I read them, and the principles of law as I understand them, that the same testimony can be used three times to convict a person of three distinct offences. But I pass on to the next point in my brief.

The Court erred in excluding evidence that no sexual intercourse had taken place with any of the women except one.

This Court has decided that proof of sexual intercourse need not be made by the prosecutor and is not essential to the offence. It has been held, however, that the prosecutor may prove it, if he can, and proof of the birth of children in Utah is taken as evidence of cohabitation.

In the Cannon case (116 U. S., p. 71,) it was held not to be error to exclude proof of non-sexual intercourse. I understand that ruling is not based on the idea that the proof is immaterial in all cases, but that the admitted facts in the Cannon case constituted cohabitation irrespective of the fact of sexual intercourse, and that the admission of the evidence could not have helped the defendant's case, and its exclusion could not injure him.

In this case there were no such conclusive facts. The

plaintiff in error had not lived in the same house with more than one woman. The evidence showed that he had merely visited, and had not lived, with more than one; and it was a question of fact for the jury whether those visits were made in good faith and for the purposes claimed by the plaintiff in error, or whether he was in fact living or cohabiting with the women. It was, therefore, proper for the plaintiff in error to show to the jury the character of those calls or visits, what occurred and what did not occur, and especially that no such decisive act took place as would convert those visits into cohabitation. The nature of the visits and the purposes for which they were made were involved, and from the admission that the women were his wives the jury may have drawn unfavorable inferences as to what occurred. A reference to the testimony will show that there was no evidence from which the court, as a matter of fact and law, could say there had been cohabitation, but that the jury should have passed upon the question, hence the court erred in applying the decision in the Cannon case.

The argument of opposing counsel illustrates the hardship to the defendant of this ruling. He insists that the testimony of Mr. Snow's wives should show that "he had become to them as other men." How could this have been done in a more effective manner than by their testimony upon this very point? It is true that Mary said "he called as any other gentleman friend," but, when pressed by the defence to a more specific statement, she was stopped by the court at this most important point and forbidden to answer.

The court erred in refusing instructions asked by the defendant as follows:

Second Request. The term cohabit means "live with" or "dwell with," and in the act under which the defendant is indicted means to "live with as wives."

Third Request. To constitute cohabitation there must be such a frequency or regularity and manner of association of a man and woman as to amount to a living together and distinguish the association from mere visits, and so long as there is not a living together, occasional visits do not amount to cohabitation.

The court refused these requests severally, and gave no equivalent instruction, or any instruction which would clearly call the attention of the jury to what constitnted cohabitation, or that the parties must in any manner live together to constitute a cohabitation.

The court charged as follows, and the plaintiff in error excepted :

It is not necessary that the evidence should show that the defendant and these women, or either of them, occupied the same bed, slept in the same room. or dwelt under the same roof ; neither is it necessary that the evidence should show that within the time mentioned in the indictment the defendant had sexual intercourse with either of them.

The question is, were they living in the habit and repute of marriage ?

The offence of cohabitation is complete when a man, to all outward appearances, is living and associating with two or more women as wives.

If the conduct of the defendant has been such as to lead to the belief that the parties were living as husband and wife live, then the defendant is guilty.

Mr. Justice Field. If a man has several wives, and he does not live in the same house, does that prove that they do not cohabit together ? Unless he keeps a harem he must keep them in separate buildings.

Mr. Richards. While it may not prove that they do not cohabit, it certainly does not prove that they do cohabit. It is, your honor, for the purpose of finding out what constitutes cohabitation that I am here with these cases.

In four sentences the court gave one negative definition, that is, told the jury what was not necessary to the offence, and three separate affirmative definitions ; and the state of the evidence is important in comparing what was asked with what was given. Occasional and quite rare calls or visits on the women, who lived in separate houses, was all that was shown, and some of those visits were to sons of the women on business. The plaintiff in error claimed before the jury that those calls were mere visits, and in that view asked that the jury might be instructed as to the meaning of the word "cohabit," and what would constitute cohabitation. The evidence showed that he had not eaten or slept, or passed an

evening or a day in the house of any of these women, and there was at least a fair question of fact to go to the jury.

The negative definition of the judge did not meet the case, and, though some of it was correct, the statement that they need not dwell in the same house was at least misleading, and not an answer to the requests. It may be conceded that cohabitation is possible without dwelling in the same house, but there was no evidence in this case calling for the instruction, and the jury could only have understood that living in separate houses and holding out the women as wives was sufficient.

The first affirmative definition is: Were they living in the "habit and repute of marriage?" The repute of marriage, and marriage in fact, were not disputed. The habit of marriage was a vague general expression from which the jury could get no information as to what was cohabitation, and was only a repetition of the substance of the word cohabitation without aiding in its interpretation. The second affirmative definition did not submit to the jury whether there was a living together, or cohabitation, which was the issuable fact, but submitted the probative fact whether there was the outward appearance of cohabitation, and did not specify to whom such appearances must be known. The differences between the requests and this definition are pointed, and the instruction had a tendency to mislead the jury as to what was the issuable fact to be found.

In the case of Livingston *v.* Maryland (7 Cranch) Mr. Justice Story, in delivering the opinion of this Court, said:

> The prayer of the plaintiffs in the fifth exception was for a direction that under all the circumstances of the case there was no such concealment as would avoid the plaintiffs' right to recover. And if, in point of law, the plaintiffs were entitled to such direction, the Court erred in their refusal, although the direction afterwards given by the Court might, by inference and argument, in the opinion of this Court, be pressed to the same extent. *For the party has a right to a direct and positive instruction; and the jury are not to be left to believe in distinctions where none exist, or to reconcile propositions by mere argument and inference. It would be a dangerous practice, and tend to mislead instead of enlightening a jury.*

The Supreme Court of Connecticut in the case of Morris *v.* Platt, (32 Conn.,) says :

The court did not conform to the request. The charge as given informed the jury what "the great principle" of the law of self-defence is, and correctly; but that was not all to which the defendant was entitled. It is not for juries to apply "great principles" to the particular state of facts claimed and found, and thus make the law of the case. When the facts are admitted, or proved and found, it is for the court to say what the law as applicable to them is, and whether or not they furnish a defence to the action, or a justification for the injury, if that be the issue. And so where evidence is offered by either party to prove a certain state of facts, and the claim is made that they are proved, and the court is requested to charge the jury what the law is as applicable to them, and what verdict to render if they find them proved, the court must comply. This is not only the common law rule, but it is carefully and explicity declared in this State by statute.

The third affirmative definition given in this case seems clearly erroneous :

If the conduct of the defendant has been such as to lead to the belief that the parties were living as husband and wife live, then the defendant is guilty.

The issue was whether the plaintiff in error had in fact cohabited with more than one woman, and this fact was to be found beyond a reasonable doubt. The defendant asked the court to say to the jury that the parties must have lived together. The court refused to so instruct, but said that if the jury found that some one might have been led to that belief it was enough. Who was to be led to that belief? If it be interpreted to mean that the jury must be led to the belief, it is still erroneous and would mean "if you find you are led to this belief by the evidence the defendant is guilty."

Fourth request. The defendant, though living with one wife, could lawfully visit another and her children at reasonable times and for lawful purposes, and the purposes of inquiring concerning the health and welfare of such other wife and his children by her, of providing for their support, and the education, employment, and business of the children would be lawful. He is not required to break off friendly relations with any of his wives and may attend friendly or social or religious meetings at their houses.

This request met every aspect of the evidence in the case and the defendant's claim of the purposes of his visits. If he can visit a plural wife at all, we submit that it should have been given.

And this brings us to the important query: Can a man visit his plural wife at all without violating the provisions of this section? She is the mother of his children and, in addition to his moral obligation to support her and them, to provide for their education and moral training, there is the legal duty to do all this imposed upon him by the same act which prohibits cohabitation. The children are as a rule at the mother's home, and need the combined wisdom and solicitude of both parents to rear and fit them for the vocations and pursuits of life. Can it be possible that Congress intended to prevent the parents from ever conferring together upon such important issues or to compel them, after sustaining these close relations to each other, to sacrifice the vital interests of their offspring and become as utter strangers? Does the law forbid them such association and intercourse as would have been proper if they had never been more than ordinary friends, and as is now necessary to the welfare of the children? Does the law, in making it the duty of the father to care for his offspring, also require that he should tear them from the mother's bosom and send them beyond her reach, lest in his bounden ministration to their wants he shall see or speak for an instant with their natural nurse—the mother? To concede these things would be to impute to Congress the cruel absurdity of imposing a legal duty upon the citizen and then inflicting a penalty for the performance of that duty. Your honors will not sustain such an inhuman construction.

No instruction equivalent to the fourth request, was given, but the jury was instructed as follows, and the plaintiff in error excepted:

Of course the defendant might visit his children by the various women, he may make direction regarding their welfare, he may meet the women on terms of social equality, but if he associates with them as a husband with his wife, he is guilty. The Edmunds law says there must be an end to the relationship previously existing between polygamists; it says that relationship must cease.

The fourth request asked the Court to say that the plain-

tiff in error might visit his wives. There is no answer to this request in the charge. The jury were told that he might visit the *children* but there was no charge of cohabiting with them. They were also told that he might "meet the women on terms of social equality." This implies nothing more than that both might be guests at a friend's house or might meet on the street or in any public place, and the term "meet" includes and would be understood to mean a casual meeting, and not an intentional one, while the term visit would mean an intentional going to see the very person visited; and it was to this view that the request was directed. What language could be more misleading and delusive than the expression: "If he associates with them as a husband with his wife he is guilty?"

What did the court mean by that expression? Whenever Mr. Snow met either of his wives, whether at their homes, on the public street, at meeting or elsewhere, the association whatever it was, although in the presence of others and entirely innocent and proper in its character, was as husband and wife. I have had occasion to state to your honors in former cases, the belief of my people with regard to the marriage relation. We believe that when once entered into and sanctioned by competent authority it becomes eternal in duration and cannot be dissolved by any human power. So that whatever association takes place between such parties it must be as husband and wife, and the jury, understanding this, must have adopted the view that under this astounding instruction the accused was guilty.

Fifth Request. Having more than one wife and claiming and introducing more than one woman as wives do not constitute the offence charged. You must find, to justify a conviction, that he has lived with more than one within the time stated in the indictment.

The prosecution had given evidence that when Lorenzo Snow was under arrest in the U. S. Marshal's office, and three of the women were there under subpœna, he had introduced the three women as his wives; and the attention of the jury

was nowhere called to the distinction between evidence of the status, and the fact of cohabitation; and the ambiguous manner in which the jury was instructed tended to mislead them as to what constituted the offence and to induce them to give undue importance to the relation of the parties. I contend that the request is fair, meets the issue before the jury, and should have been given.

The only answer to the request is found in the clauses of the charge already quoted, that "the Edmunds law says there must be an end of the relationship previously existing between polygamists. It says that relationship must cease."

The giving of this instruction was gross error. The "Edmunds law," as construed by this Court, does not say that "there must be an end to the relationship previously existing between polygamists," nor that "that relationship must cease." But, on the contrary, this Court, in construing that statute, in the case of Murphy *v.* Ramsey, (114 U. S., 43,) expressly negatives that idea in the following language:

> The crime and offence of bigamy or polygamy * * consists in the fact of unlawful marriage. * * Continuing to live in that state afterwards is not an offence, although cohabitation with more than one woman is.

This instruction, that the law said the relationship must cease, left the jury to infer that there must be some measures taken to sever the "relationship," and that a man could not admit that the relationship of husband and wife existed without being guilty. Such is not the law. That law punishes the offence of polygamy and the offence of living with more than one woman as wives; and if the old relationship or status, as distinguished from some new affirmative offence is maintained, the polygamist cannot vote. In a prosecution for unlawful cohabitation, it is gross error to use language from which the jury must have understood that the maintenance of the relationship was the gist of the offence. This adopted the theory that the "holding out" as wives was the gist of the offence and virtually declared that the polygamous status itself was criminal.

Mr. Snow had admitted the relationship, and the jury undoubtedly understood from this part of the charge that upon such admission they were directed to convict.

When I say he had admitted the relationship, I do not mean that he admitted the continuance of any polygamous practice or conduct, but the existence of that spiritual relation which had long before been entered into by him and his wives and which, according to their belief, still continued and will continue to exist, even in eternity, no matter whether they live together in this life as husband and wives or not. This is what he meant, and all he meant, by the admission that the women were his wives and that he had claimed them as such, and yet upon that admission and this instruction the jury found him guilty of unlawful cohabitation.

Sixth Request. The law assumes the defendant innocent until he is proven guilty beyond a reasonable doubt, and his guilt or innocence is to be determined by you, and what others or the public may have believed or had reason to believe from his manner of living is not the issue, but you are to say from the evidence whether or not he did in fact live with more than one woman as charged.

This request brought the Court squarely to the point whether cohabitation in fact with more than one woman was necessary or not, and he refused to tell the jury. Can any one doubt that the defendant was entitled to have this instruction given? It would seem strange that the necessity should arise for asking a court to tell the jury what the issue was which they were to try, and utterly incredible that, when asked to so charge, a court should refuse; but such a necessity certainly arose, and such a refusal was positively made in this case.

The only answer to the instruction asked for justifies the request, and is as follows:

If the conduct of the defendant has been such as to lead to the belief that the parties were living as husband and wife live, then the defendant is guilty.

Our seventh and eighth requests were as follows:

Seventh Request. The defendant was not required to give any notice, public or otherwise, of his manner of life or purpose, or whether he was or was

not abstaining from cohabiting with more than one woman, and it is a sufficient defence if you find from the evidence that it is not shown beyond a reasonable doubt that he in fact did live or cohabit with more than one.

Eighth Request. It is immaterial whether or not there was any change of conduct toward, or of relations with, his wives at the time of the passage of the Edmunds law, if at and prior to that time he was not violating the provisions of the act relating to cohabiting with more than one woman, and if in 1885 he has not so cohabited, he is innocent of the present charge, whether such innocence is the result of a change of relations with his wives, or the result of a maintenance of former relations.

These requests were material, in view of the evidence comparing the defendant's manner of living in 1885 with his manner of living during the last ten or more years, and the instruction permitting the jury to consider such evidence, and the declaration to the jury of what the Edmunds law says. And I most confidently assert that the defendant was entitled to have each and all of the requests given. The refusal of the Court to instruct the jury as to the real issue and the misleading and erroneous instructions given undoubtedly led the jury to convict my client, not because he had lived or cohabited with more than one woman, but simply because he admitted that the women whom he had married for time and eternity were still his wives. Such gross errors certainly entitled him to a new trial, and the court below erred in not granting it.

In each case judgment for three penalties is entered upon the record. I do not understand this practice, and it certainly affords opportunity for great injury to my client. The commitment in each case requires his imprisonment for the term of eighteen months, when the time should be but six months, because the satisfaction of one commitment would not, on its face, be a satisfaction of the others.

If your honors please, I come now to the question of segregation which is raised by the pleas of former conviction interposed in two of these cases. Three indictments were found against Mr. Snow on the same day and by the same grand jury, for cohabiting with the same women in 1883, in 1884, and the eleven first months of 1885, respectively. The question is simply this : Where the alleged cohabitation has

been continuous and at the same place and with the same women, can it be divided by an arbitrary division of the time into several offences ?

The statute only prescribes one penalty for unlawful cohabitation; and as the offence in its very nature is continuous, consisting of a continuing act or series of acts, all amounting to the one thing termed cohabitation, it is necessarily the same offence until the continuity is broken by a prosecution, or by some marked act or cessation ; and where the continuous act covers every day for a period of nearly three years, as shown by these indictments, the offence is one and indivisible. It is merely arbitrary to divide such a continuous act by years—it is just as susceptible to division by months, weeks, or even days—and such arbitrary division shows that there is no division in fact or in law, and that it can have no principle to support it.

So far as the books disclose, this is the first time that an attempt has ever been made to segregate the offence of cohabitation, a fact which is itself very significant, and will doubtless have its weight with this Court in determining this very important question. I say important, because, as I will show your honors in the course of my argument, it resolves itself into the simple proposition, whether it is possible for the prosecutor and grand jury, by this novel procedure, to so change the punishment prescribed by law, that it may become life imprisonment for an offence to which the statute has attached, as the maximum penalty, six months imprisonment and three hundred dollars fine.

But while we find no case directly in point, the principle we invoke has been applied in numerous cases which are analogous to this, and the reasoning of the courts in those cases is so cogent that we see no room for doubt as to the soundness of our position. In the case of Sturgis *v.* Spofford, (45 N. Y., 446,) the Court held that only one penalty could be recovered for several violations of a statute occurring before the suit was brought, and in speaking of the reason

and policy of the law the Court uses the following pertinent language:

> If the prosecution is promptly instituted for a single offence, it operates as a salutary warning to discontinue the practice or acts complained of, while delay may be regarded as an acquiescence in the right of the party to perform the act. * * * Under this rule the party prosecuted will have an opportunity to desist from doing the act complained of, and if he does not, he will knowingly incur all the hazard of repeated prosecutions.

In the case of Fisher *v.* N. Y. C. and H. R. R.R. Co., (46 N. Y., 644,) the same doctrine was held, and the court says:

> But one penalty can be recovered upon the statute under consideration, for all acts committed prior to the commencement of the action. If after this it is again violated, another may be recovered in another action commenced thereafter, and so on as long as violations continue. This will not only tend at once to put a stop to the extortion when it is committed knowingly by the defendant, but where it is done under a mistake as to its rights, will it give notice that its right to charge the amount claimed is challenged, and will induce a cautious examination of the question, and an abandonment of the claim before a ruinous amount of penalties have been incurred.

If it be necessary that the Government should give a defendant notice, by commencing suit in each case, where the penalty is only $50, how much more imperative must be the rule in a case like this, where the penalty imposed may be both fine and imprisonment, and where the delay might cause the defendant not only to incur "a ruinous amount of penalties," in fines, but even to subject himself to imprisonment for life.

The CHIEF-JUSTICE. Your position is that they cannot divide up a continued cohabitation into parts?

Mr. RICHARDS. Yes, sir.

The CHIEF-JUSTICE. Here they seem to have made only one arrest.

Mr. RICHARDS. That is true. They waited until more than three years after the law was passed before commencing any prosecution, and then arrested the defendant and indicted him three times, on one examination of witnesses before the grand jury, for a continuous cohabitation extending back two years and eleven months. This is what we complain of, and

we say there was but one offence, and should have been but one indictment and one prosecution.

The CHIEF-JUSTICE. They charged him with cohabitation with the same women in every case?

Mr. RICHARDS. Yes, sir; and introduced the same evidence to convict him in each case, using it three times and procuring three convictions.

Mr. JUSTICE MILLER. I understand that the indictment for the offence committed in 1885 was first tried, and the defendant convicted.

Mr. RICHARDS. Yes, sir.

Mr. JUSTICE MILLER. And you pleaded that in bar of the others.

Mr. RICHARDS. Yes, sir; and when two of the cases had been tried, we pleaded them both in bar of the third.

The CHIEF-JUSTICE. Your argument is to the effect that occasional cohabitations are liable to aggregate the punishment, while a continual cohabitation will curtail it?

Mr. RICHARDS. I do not so understand it, sir; my position is this: The legislative power declares what shall constitute the offence and prescribes a penalty for committing it. Whenever the Government has information that the offence has been committed, it may prosecute, whether the cohabitation has continued a month or a year, but until it does prosecute there can be but one offence. After an indictment is found and the party has notice, as the New York court says, then if he repeats the offence he may be prosecuted again, and so on. But my contention is that the cohabitation being continuous, cannot be divided up and made to constitute several offences.

The CHIEF-JUSTICE. Does it appear on the record that this was a continued cohabitation?

Mr. RICHARDS. It does. The indictments are all contained in the pleas of former conviction and, together, charge a continuous cohabitation covering every day between January 1st, 1883, and December 1st, 1885.

Referring again, your honors, to the authorities. In Mayor of New York *v.* Ordrenan, (12 Johns.,) the doctrine we are here contending for is emphatically declared, and a decision by Lord Mansfield is quoted in support of it.

The Supreme Court of North Carolina in the case of State *v.* Commissioners, (2d Murphey, 371,) denounced this procedure in the following terms :

> Were such a doctrine tolerated, it is impossible to say where its consequences would end. * * * This notion of rendering crimes, like matter infinitely divisible, is repugnant to the spirit and policy of the law, and ought not to be countenanced.

The reasoning of the courts in these and other cases cited in our brief, would seem to place the matter beyond all controversy, were it not that in one single case, Commonwealth *v.* Connors, (116 Mass., 35,) the Supreme Court of Massachusetts held otherwise, and upon this case the counsel for Government relies. Two indictments were found against the defendant on the same day for keeping a tenement for the illegal sale of liquors, and the court held that both indictments might stand, on the theory, as stated in Commonwealth *v.* Robinson, (126 Mass., 35,) that the grand jury is vested with "a very large discretion in limiting the time within which a series of acts may be alleged as constituting a single offence."

It is difficult to understand by what process of reasoning the Court reached this conclusion, or to reconcile it with the elementary rules of law. That legislative power can only be exercised by competent legislative authority is well settled, and that no judicial or executive officer or body can usurp such functions will not be denied ; and yet, while the law should always be fixed and definite in its requirements, and never shifting or uncertain, it is contended that a grand jury may, at its pleasure, by making two or more presentments in a certain case, increase the penalty prescribed by law and so subvert the legislative will, expressed in unmistakable terms. To adopt such a rule is to concede the power to a grand jury to make or modify the law in its most important and vital part.

It cannot stand on principle, for, as the Supreme Court of Iowa says, in the case of State *v.* Egglesht, (41 Iowa, 574 :)

> He (the defendant) either committed one crime or he committed four. It is not competent for the State at its election, by the form of its indictment, to give to defendant's act the quality of one crime or of four at pleasure. The act partakes wholly of the one character or wholly of the other.

Now I most respectfully submit that this clear enunciation of a most important legal principle must be correct, and that the question involved is solely a question of law with which the grand jury can have nothing whatever to do.

When we come to consider the point as it has arisen in these cases, we see at once how utterly preposterous and unjust the theory of the prosecution is. Here the defendant was permitted, without any interference on the part of the Government, to keep up an alleged continuous cohabitation for nearly three years ; and then he was indicted and convicted for three offences and sentenced to 18 months' imprisonment and to pay a fine of $900, when the law under which he was prosecuted fixed the maximum penalty for such an offence at six months' imprisonment and $300 fine. As I have shown, the division of time by years is merely arbitrary, and if the grand jury could legally find three indictments they could just as well have found thirty or 300. The adoption of this theory enables the prosecution to sit supinely by for a period of three years, without any effort to enforce the law, and then, with one fell swoop, come down upon an individual with prosecution enough, for offences already committed, to render him liable to imprisonment for the remainder of his life, and to absorb in fines an immense fortune ; because if a man can be indicted for each year he may be prosecuted for each month, or each week, or even for each day in the three years of limitation. If indicted for each month, the imprisonment would aggregate 18 years and the fines would amount to $10,800 ; while an indictment for each week would entail an imprisonment of 78 years and fines amounting to $46,800. When the calculation is

extended into days the result is simply appalling, showing an imprisonment of 547 years and fines amounting to $328,-500.

And this is by no means an idle speculation upon this point, for the very judge who tried these cases declared that there was no legal principle which would prevent this rule from being carried to the full extent which I have suggested.

Assistant Attorney-General MAURY. Do the records disclose any such language as that?

Mr. RICHARDS. No, sir, not in these cases; but it is a public historical fact to which I am entitled to refer.

I confidently submit that it is utterly impossible that Congress ever intended to authorize, or permit, the perpetration of such an inhuman outrage in the name of justice.

In the second and third cases tried, the Court charged the jury as follows:

> If you find beyond a reasonable doubt that the defendant had, during the year 1884, (in one case 1883,) a legal wife living in Brigham City, Box Elder county, Utah Territory, from whom he was undivorced; that he recognized her as his wife, held her out as such, and contributed to her support as such wife, and that during the same year he lived in the same house with the woman Minnie, recognizing her as his wife, associated with her as such, and supported and held her out as a wife, then the offence of unlawful cohabitation is complete, and you will find the defendant guilty. The legal wife in this case is the woman whom the defendant first married.

In the case first tried, it appeared in evidence that Adeline and Charlotte (who is now dead) were married to the defendant at the same time and that they were his first wives, and that Sarah was next married to him. Upon this state of facts the Supreme Court of Utah, in its opinion delivered by Chief-Justice Zane, declared that Sarah was the lawful wife.

In the second and third cases it only appeared that Adeline was the first one married, and she was treated as the lawful wife in these cases, and so referred to in the foregoing instruction. It was undisputed that the defendant lived with Minnie, the last one married. There was no evidence that he had even seen Adeline in 1883 or in 1884, and no proof was offered of

visits or any kind of association between them, and the instruction required nothing of the kind.

It will be remembered that the question to be determined by the jury was not—as might be inferred from the argument of opposing counsel "Who was Mr. Snow's legal wife?" but the real question was, "Had he cohabited with more than one of his wives?" The Court by this instruction took the question entirely from the jury as to cohabitation with one of the women, and told them, as a matter of law, that living in the same city with a legal wife and recognizing, holding out, and supporting her as such, constituted cohabitation, without any proof that the accused had ever, during the period charged, seen his wife or been in her presence; and that, too, in the face of the wife's positive statement that he had not in any way lived with her during said period.

Mr. Justice HARLAN: He admits that he claimed her as his wife?

Mr. RICHARDS: Yes, sir.

Mr. Justice HARLAN: And supported her as his wife?

Mr. RICHARDS: Yes, sir.

Mr. Justice HARLAN: Now, what additional fact is necessary to constitute cohabitation?

Mr. RICHARDS: The fact that he lived with her.

Will it be contended that if Lorenzo Snow had lived in Brigham City during these three years, and Adeline Snow had lived in Australia, and he had said "She is my wife, and I have claimed her as such all this time," that he would be guilty of cohabiting with her? If there is any difference in principle between such a case and that of my client I fail to see it.

In defining cohabitation, this Court has adopted the second definition of Worcester which is, in substance, the living together of a man and woman as husband and wife. The offence manifestly consists of the substantive act of living together, added to a status or relation of the parties, the result of a former act, which, in the case of Adeline, occurred

over forty years ago. In respect to this status no new act is required. It may be maintained passively by merely not denying the marriage, or at most by an admission that the relation continues. Without the act of living together there is nothing to meet the substantial part of the defined offence. The Court, in this case, defined the offence to be living with one woman as a wife and having a legal wife living who was admitted to be a wife. The words of the law, "cohabits with more than one woman," are wholly ignored. The status of one, and the living with the other, are substituted for a living with both.

The act of Congress provides for three classes of cases. It prescribes punishment for contracting the polygamous relation; it punishes a maintenance of polygamous cohabitation where the relation has previously been contracted, and section 8 imposes disabilities for the maintenance of the relation or status. These three things are distinct. The instruction unites sections 3 and 8 to make an offence under section 3. It does not cover cohabitation with more than one woman, but cohabitation with one, and the existence of the status defined in section 8 with another; while section 3 requires not only the status, but the substantive act of cohabitation in that relation, "with more than one woman." The charge of the judge defines adultery or a living in adultery, while this Court has said that illicit sexual relations are not what is punishable under section 3, but that this section punishes the maintenance of two households or homes, and implies such an association as will constitute cohabitation. The words, "as wives," or "under claim of a marriage relation," are held to be implied in section 3 in furtherance of the general purposes of the whole act. The instruction makes these implied words the substantive definition of the offence, and omits the word "cohabit" as part of the definition. The living with one, and being in a status defined by section 8 with the other, is thus by the charge made criminal under section 3.

This changes entirely the scope and effect of the law and makes it operate as if it read: "Any male person who cohabits with any other woman than his legal wife," whereas the statute now reads: "Any male person * * who cohabits with more than one woman." Under the plain letter of the law, no unlawful cohabitation can exist with one woman only. There must be an actual cohabitation "with more than one woman" to constitute the offence.

There is a further objection to the instruction. It makes the presumption of cohabitation with the lawful wife indisputable as a matter of law, and does not permit the jury to determine the facts or permit the presumption to be rebutted by evidence. In these cases the whole evidence shows that the defendant had lived exclusively with his wife Minnie, and the repute shown was to the same effect. Under this statute it being incumbent on the prosecution to show a cohabitation with more than one woman, as a matter of fact, and the presumption of innocence being one directly in the issue, it must prevail over other and more remote presumptions. In a certain class of cases there may be a presumption of cohabitation with the lawful wife, as, for example, where the paternity of a child is in question and the circumstances are such as to admit of the husband's having had sexual intercourse with the wife, but even in those cases the presumption may be rebutted by showing that the husband did not have access to the wife. But in a criminal case like this there is no such presumption, and if there were it would be met and rebutted, in the absence of proof, by the presumption of innocence in the issue on the particular charge, and this presumption of law is stronger than more remote presumptions of fact.

The persistent ignoring, by the lower courts, of the defendant's sacred right to the presumption of innocence, was one of the most glaring wrongs inflicted upon my client in the whole course of these extraordinary trials, so fruitful of judicial error. It was unprecedented that the court should

wrest from the assailed man the shield created for him and given to him by the law.

Rufus Choate, in speaking of the presumption of innocence, said:

> It is in the nature of evidence for the defendant. It is as irresistible as the heavens, till overcome: it hovers over the prisoner as a guardian angel throughout the trial and it goes with every part and parcel of the evidence. It is equal to one witness.

I insist that there was no presumption of cohabitation in these cases, but if there was it could only be a presumption of fact, the weight of which was for the jury; and they should not have been told to convict as a matter of law, but instructed that they might draw the conclusion of fact if there was any evidence tending to show it. The conviction of Mr. Snow in the two last cases is wholly due to this instruction, for without it the jury never could have found him guilty under the evidence. It is impossible that any twelve sane men could be found in this broad land who would say that a man was guilty of criminal cohabitation with a woman whom he had never seen during the time charged. Such a monstrous absurdity could never emanate from the jury box. It belongs to that strange judicial creation known as "constructive cohabitation," and was even repudiated by Chief-Justice Zane in his dissenting opinions in these cases. But the proposition, whatever its origin, is too preposterous to admit of serious argument.

A great deal has been said during this discussion about putting an end to the relationship existing between these parties, and opposing counsel has intimated that there are many ways in which this may be done; but as yet he has failed to point out any one of these ways, although pressed by the court upon this very point. Why was it that he refrained from telling, in clear unmistakable terms, how this relationship could be dissolved? Is it possible that he could not do so? Let us see. There is existing between Mr. Snow and his wives a marital relationship which they believe to be

eternal and indissoluble in its character. Except as to the first or legal wife this relationship is not recognized by the law as being valid, but on the contrary all the subsequent marriages are legally void, hence there can be no divorce. Considered from a legal standpoint, these marriages never existed and therefore cannot be dissolved. No lawyer will dispute this proposition, and, when it is conceded, we perceive at once the utter impossibility of legally terminating a relationship which never had a legal existence. I suppose it was for the purpose of avoiding this dilemma that counsel asserted here that the women named in these indictments made the pretence of being lawful wives. Doubtless he believed what he said to be true, but it is not. Such a claim is not made by any plural wife. Their claim of marriage is based entirely upon their religious belief, and not upon any recognition of the law, for they realize that they have no legal status as wives.

The CHIEF-JUSTICE. Now this is a point that is new to me. I never heard of that before, and it seems strange that it did not come up here before.

Mr. RICHARDS. It has always been so. They never have claimed the legal status of wives. Their religious belief in the divinity of the revelation on celestial marriage teaches them that their marriages are sacred in the sight of God and extend through time and eternity, although not recognized by the law of the land. That is their position now on this point and it always has been their view of the subject; but of course there is a marked difference in many instances between their manner of living now and before the passage of this law.

Mr. Justice BRADLEY. Do you mean since the passage of the act of 1862?

Mr. RICHARDS. I mean there has been a change in the manner of living since the passage of the "Edmunds law," but the status of the wives has always been as I have stated, both before and since 1862.

The CHIEF-JUSTICE. How are her children looked upon?

Mr. RICHARDS. They are acknowledged and provided for.

The CHIEF-JUSTICE. Are they his heirs?

Mr. RICHARDS. Yes, sir. Under our statute illegitimate as well as legitimate children inherit when recognized and acknowledged by the father.

The CHIEF-JUSTICE. Are those illegitimate children recognized by the laws of Utah?

Mr. RICHARDS. Only so far as to secure an inheritance in their father's estate.

Mr. Justice MILLER. I never heard of that before.

Mr. RICHARDS. The question was never raised before, and the legal aspect of it was so clear that I presumed it was well understood by everybody, and so never had occasion to mention it. You will remember that section 7 of the "Edmunds law" legitimates all the children of plural wives born prior to January 1, 1883. Those born thereafter will inherit under our statute equally with legitimate children, but plural wives do not inherit.

The CHIEF-JUSTICE. They have no rights under the law have they?

Mr. RICHARDS. They can receive by will, and can acquire and hold all kinds of property in their own right.

Mr. Justice BRADLEY. In 1850 the Territory was constituted by Congress, and the Legislature was given full power to enact all laws that they could rightfully enact. Was any legislation as early as that made in regard to the status of these wives and children?

Mr. RICHARDS. I think the first territorial law on inheritance and the estates of deceased persons was passed in 1852, providing that illegitimate as well as legitimate children should inherit.

Mr. Justice BRADLEY. There had been a code of laws sometime before that, I suppose?

Mr. RICHARDS. Yes, sir; the provisional government of the State of Deseret had enacted a code of laws which were reenacted on the organization of the Territory.

Mr. Justice BRADLEY. The common law was not adopted in terms, was it?

Mr. RICHARDS. No, sir; and in none of these acts did the Legislature ever attempt to give the plural wife a legal status. It was, and is, altogether a matter of religion with them.

The CHIEF-JUSTICE. Do I understand you to say that where there are plural wives there is no legal wife recognized by the laws of Utah?

Mr. RICHARDS. No, sir; I do not say that.

The CHIEF-JUSTICE. There is one legal wife, is there?

Mr. RICHARDS. Yes, sir; there is no marriage law in the Territory, and the first wife is regarded as the legal wife.

The CHIEF-JUSTICE. Suppose there are two married at the same time?

Mr. RICHARDS. That is a question that has never been raised or decided by any of the courts until it came up in these cases.

The CHIEF-JUSTICE. Is there any difference in the marriage ceremonies?

Mr. RICHARDS. None, whatever; and I may add that all the marriages are regarded by the Mormons as being equally sacred, and the first wife recognizes all the other women to be wives.

When your honors commenced to interrogate me upon this point, I was endeavoring to show some of the difficulties in the way of changing the relationship of these parties, and had succeeded, I think, in demonstrating the impossibility of legally terminating an eternal marriage relation, which is not recognized as having any legal existence. I cannot but presume that it was the realization of this fact which induced silence on the part of opposing counsel as to how it should be done, and impelled him as a last resort to declare that a man might escape from the dilemma by saying of his plural wives: "I do not acknowledge these women to be my wives." But this does not help the matter any. When the man and his wives all believe the relation

existing between them to be an eternal one, how can he say the women are no longer his wives? He certainly cannot conscientiously and truthfully say it, for he does not believe it, and to require such a declaration from him, would not only be in direct violation of his conscience, but it would be a palpable infringement upon his constitutional right to believe as he pleases and to give free expression to that belief. And yet that is the only possible means by which Mr. Snow could have secured immunity from the penalty of this law. He had conformed his conduct to its requirements, and the renunciation of his wives was all that was lacking to satisfy his most exacting accusers. To seriously argue the question of his obligation to do this would be to insult the intelligence of this honorable court, and I forbear.

But counsel for the Government, while failing to offer a feasible method of settling this question, takes occasion to speak lightly of the devotion and sacred affection which continue to exist between the husband and wives, after he has separated himself from their beds and passed from under the roofs which shelter them. Counsel questions the existence of a platonic love which could abide in perfect trust and satisfaction, fed only by the hope of eternal union beyond the grave. Though such an affection be too occult for the learned gentleman, still there may be men and women to whose exalted minds and pure hearts it would be no mystery. And if people do live upon this earth who are capable of giving loyal homage to this love, which looks trustingly to the future for its only recompense, those people are the practicers of plural marriage among the Latter-day Saints—men strong of intellect and frame, who have been schooled to perform their duty at any cost; and women, pure of heart and chaste of body, whose earthly love is but a part of their eternal religion.

Such a people, I believe, could maintain purely and justly, the passive, waiting relation held by my client with his wives. But it is in part against such a quiescent status, with its attendant platonism, that government counsel asks for drastic

measures. This is not an unfamiliar sound. No matter what inhumanity is sought to be executed against the people of Utah, no matter what solemn protest is offered, the cry is always the same : "Heed no remonstrance, for drastic measures must be used." Have "drastic measures" no boundary line—no limit beyond which they may not go? Is our boast that the Constitution forbids oppression and affords ample protection to the citizen, an idle one? Is there no point where cruelty and unconstitutionality begin? If not, then why refrain from relieving counsel of his humane regret that my people had not long since been put to the sword? If it would be better to have slaughtered them without remorse half a century since, might it not still be better to exterminate us now—men, women, and babes alike? This latter plan would exactly suit the idea which some insatiable people entertain of a "drastic measure."

I thank your honors for the patience with which you have listened, and the kindness with which you have assisted me, by your questions, to make plain the points of this mighty issue, some of which you have been pleased to say were even new to you. And it may be that the subject is not yet exhausted.

But, your honors, I cannot leave these cases without briefly alluding to a most unjust and cruel aspersion which has, during this discussion, been cast upon my client and upon the Mormon people—that their religion was being used as a cloak for lust. I would gladly pass it by in silence, because I can imagine from my own reluctance to speak, how unpleasant it must be for you to listen; but my duty demands that I should state the facts in regard to this matter, even at the risk of exhausting your patience and possibly provoking criticism. Duty to myself, duty to this honorable Court, duty to my client, and duty to an honest, Godfearing and virtuous people, all require that I should stamp upon this merciless charge the brand of falsehood. I say it is not true. Those Mormons who have taken a plurality of wives have entered into

that order of celestial marriage with the purest of motives and from the strongest possible sense of religious duty. I challenge contradiction of this statement from any honest person who has observed and studied the lives of these people, with a view to ascertaining their real status and motives.

You have before you in these very cases one of the strongest possible evidences that the charge to which I have referred is nothing but a popular fallacy. Let us look for a moment at the history of the "Edmunds law," with its judicial constructions, and see if I am not warranted in making this assertion. The act itself declares that "any male person who cohabits with more than one woman" shall be punished; and at the time of its enactment, the promoters of the measure urged its passage in the interests of morality and social purity; but when it came to be construed it was declared to apply only to cohabitation in the marriage relation, and not to "meretricious unmarital intercourse." It is a well known fact which cannot be disputed that a man may, under these constructions of the law, cohabit with two or ten women; and, although he flaunt the evil example of a lascivious cohabitation, in its fullest sense, in the very face of the public, he will not offend against the law and can not be punished under it so long as he does not acknowledge the women as wives, and they do not recognize him as their husband.

No man knows this fact better than my client, Lorenzo Snow; and yet, though he has outlived his three score years and ten, he is to-day wasting his brief remaining lease of life in a loathsome prison, the companion of felons and murderers—not because he has lived with two women in the intimacy of husband and wives, nor because he has even dwelt with more than one of them, but, forsooth, because he has acknowledged the existence of a relationship between him and them which was created more than a generation since, and which he and they believe to be eternal in duration and incapable of being dissolved by any human

power. How do these facts sustain the charge of licentiousness?

Your honors have been told that the enlightened civilization of this great nation is imperilled by this "monstrous evil." Without comment upon the absurdity of the idea of a cherished institution of sixty millions of people being imperilled by the practices of two thousand men in an isolated territory of this great Republic, I pass on with my argument.

One would almost think, in listening to the moral eloquence of Government counsel, that the Mormons must be utterly ignorant of the facilities afforded for the gratification of men's passions by the civilization of the age. But such is not the case. Mr. Snow and his compeers have been reminded of these things too often, by the suggestions and examples of their would-be reformers, to be ignorant of the true state of affairs. They are asked to renounce a so-called barbarism, which teaches men to assume the full responsibility of all their acts, making wives of the women with whom they associate, and acknowledging the paternity of their children—and to accept a higher civilization which provides wives (in every sense, but not in name,) for the commercial travellers, of whom counsel has been speaking, in every town they visit; which denies to women the privilege of becoming honored wives and mothers and consigns thousands of them to lives of degradation, infamy, and shame; which tolerates a social evil that flourishes throughout Christendom and thrusts itself into the very capital of the nation. If my client were the selfish and sinful man that has been depicted here, how quickly he would have renounced his moral and religious obligations and, with popular approbation, have availed himself of these superior facilities and tempting allurements. But no, there is in him a religious conviction that is stronger than life itself, and which enables him to patiently endure, not only the contumely of the world, but even imprisonment, and if need be, death.

We have witnessed to-day a most startling illustration of

the power of popular clamor. Does any one believe that the learned counsel for the Government could, in the discussion of any other subject, so far forget the dignity due this honorable presence as to suggest that "it would have been better had these people been put to the sword in the first instance?" What an expression to fall from the lips of the legal representative of the greatest Government on earth, with reference to some of its most loyal citizens—and uttered too, in this temple of justice, where reason reigns, and where the clamor of the multitude must not enter. Such things have been spoken before, in the dark ages that are past and gone forever, but never in this nineteenth century has a more cruel and inhuman thing than this been said. I need not answer it, because your honors will not consider it. This nation needs no more chapters written in blood and tears.

It has often been written that constitutional limitations and safeguards are instituted for the protection of the weak and to restrain the oppressive power of the strong. Majorities can always take care of themselves; it is only the minority that needs the protecting shield of the Constitution. And when that minority is unpopular, and its numbers are few, there is then the greater moral obligation upon the Government and its representatives to see that their rights are not trampled upon nor their liberties abridged. We are here to-day asking the most exalted tribunal on earth to protect the liberty and preserve the constitutional rights of an American citizen; we ask that principles of law and rules of evidence, which are as old and as well established as our jurisprudence itself, be applied to these cases as you would apply them to any other case. This is all we ask and it is what we most confidently expect at your hands. This nation cannot afford to disregard the rights of the citizen, even though he be a Mormon, and history has demonstrated the fact that every departure from the fundamental law is at the peril of the Government itself; for when

once a constitutional barrier is broken down, no one can tell when the breach will be repaired, nor what devastation and sorrow may follow.

When counsel tells us that "this thing must be stamped out," what does he mean? Certainly not polygamy, for there is no such charge in these cases. Nor can he mean living in the practice of polygamy, for the records in these cases show conclusively that there was no actual cohabitation with more than one woman. There remains, then, simply the religious belief of Mr. Snow and his wives that their marriage relations are eternal, and it must be that belief which is to be stamped out. Can it be possible that the lessons which history teaches upon this subject have been lost to us? Who ever heard of a man's convictions being legislated away, or his belief removed by persecution and oppression? The legislative power may control men's actions, but it cannot interfere with their belief, nor with the expression of that belief; and yet we all know that if Mr. Snow had denied the relationship existing between himself and his wives, if he had renounced them *as wives*, these prosecutions would never have been commenced.

In conclusion I can but ask your honors for a reversal of the judgments in these cases, and for a just and humane construction of this statute in its application to them, that the people who are affected by the law may know its requirements and be able to avoid its penalities. The liberties of many people are involved, and with some even life itself is in the balance. Point out the line of conduct they must pursue, but place the seal of your condemnation upon all attempts to wrest from them a religious belief which can never be surrendered while life and being last. I now submit the cases in the fervent hope that you will fully and mercifully answer the question, which has been so frequently propounded by the Court during this discussion, "What must these people do?" To that question the counsel for the Government has given the Court no intelligible answer.